

Nicholas Carbone v. U.S. General Accounting Office

Docket No. 72-704-02-85

Date of Decision: August 31, 1987

Cite as: Carbone v. GAO (8/31/87)

Before: Brown, Presiding Member

Age Discrimination

Constructive Discharge

DECISION OF THE PRESIDING MEMBER

I. INTRODUCTION

Petitioner Nicholas Carbone, at the time of his employment, was a GS-15 Assistant Regional Manager in the Boston Regional Office, Boston, Massachusetts. At the time of his retirement, the Petitioner had been employed by the Federal Government for over thirty-three years - all served in the Boston Regional Office.

The hearing in this case was conducted at the John F. Kennedy Building, Government Center, Boston, Massachusetts; the Federal Reserve Building, Atlantic Avenue, Boston, Massachusetts; and the Office of the Personnel Appeals Board, Washington, D.C. Both parties were present throughout the Hearing -- and the Petitioner was represented pro-se. Both parties were given full opportunity to examine and to cross-examine witnesses and to offer evidence.

II. BACKGROUND

On July 24, 1983, Mr. Mort Myers officially took over the duties of Regional Manager of the Boston Regional Office (Tr. Oct. 31, 1986, page 163, lines 1-15). He had, however, had discussions with Mr. Carbone as early as April, 1983-prior to his assuming his official duties as Boston Regional Manager concerning the history of the Boston Regional Office (BRO) and his aspirations and expectations for the organization. (Tr. Oct. 31, page 24, lines 1-7 and 19-24.

On July 6, 1983, the Comptroller General, GAO, requested that personnel from the regional offices be assigned to the Post Assignment Quality Review System (PAQRS) team. Mr. Carbone was assigned to the team from the Boston Regional Office, effective October 1, 1983 (Agency Exhibit 3, Part 2, Exhibit 25-A; Tr. November 5, pages 65-69; page 70, lines 3-24). The assignment was made by Mr. Myers (petitioner Exhibit 9). Mr. Carbone served on PAQRS for approximately fourteen (14) months, until the end of December, 1984 (Tr. Nov. 6, page 281, lines 1-24).

On July 10, 1983, Mr. Jan Goldstein, a former GS-14 of the Washington Regional Office (WRO), was appointed the ARM for Operations, GS-15, in the BRO. He was 37 years of age at the time and had worked for Mr. Myers as a GAO Evaluator when both worked in Washington, D.C. The request for promotion was initiated by Mr. Myers on May 5, 1983, approximately one month after Mr. Myers became

the Regional Manager of the BRO (Agency Exhibit 3, Part 2, Exh. 23; Tr., Oct. 29, pages 306-308).

In October, 1983, Mr. Ken Croke became an ARM for Planning and Reporting in the BRO. Mr. Croke was approximately 49 years of age at that time. Mr. Carbone at the time of Mr. Croke's appointment, was on TDY to Washington as a member of the PAQRS team (Tr. Cot, 29, page 312 lines 13-24; page 316, lines 1-24). Mr. Croke had worked for Mr. Carbone for approximately two years (Tr. Oct. 29, page 316, lines 1-24).

On January 31, 1985, Mr. Francis Fee, Assistant Comptroller General for Operations, Headquarters, GAO, Washington, DC informed Mr. Carbone that Carbone's reassignment to Mr. Fee's office, which was to have become effective October 1, 1984, would become effective on March 18, 1985 (Agency Exhibit 3, Part 2, Exhibit 21-A). The stated reason for the reassignment was that the need to assign Mr. Carbone "someplace other than Boston persists because of his difficulty in maintaining positive work relationships there" (Agency Exhibit 3, Part 2, Exhibit 21). The position was in Washington, DC and entailed a permanent change of station (PCS) for Mr. Carbone.

On March 7, and again on March 11, 1985, (Agency Exhibit 3, Part 2, Exhibit 19A), Mr. Carbone protested that a PCS was not practicable because his wife refused to move away from her family and friends. For this reason, he stated, the PCS created a hardship (Petitioner Exhibit 9, Oct. 31, 1985). He stated, further that his wife was in the hospital three times during his fourteen-month TDY on the PAQRS team, and had two major operations (Tr. Nov. 6, page 281, lines 1-24).

On March 18, 1985, Mr. Carbone reported for duty to the position to which he had been reassigned; and on March 29, 1985, eleven (11) days later, he retired (Pet. Exh. 9, Oct. 31, 1985). Mr. Carbone had been reassigned from a Supervisory GAO Evaluator, GS-15 (ARM) position at BRO, to the position of a Management Analyst, non-supervisory, GS-15, in the Office of the Comptroller General for Operations, Washington D.C. (Agency Exh. 3, Part 2, Exhibit 22).

In his Complaint, Mr. Carbone, alleges that the Agency, under the pretext of both Carbone's inability to establish and maintain positive work relationships with staff and management, and a valid need for his "talents" in Washington, transferred him by means of a permanent change of station (PSC) to Washington, D.C., and thereby both constructively discharged and discriminated against him because of his age immediately prior to and beginning with his becoming eligible for retirement (Tr. No. 13, page 10, lines 11-020). He contends that (1) he had no regional management responsibilities under the Regional Manager, Mort Myers; that he was assigned to the PAQRS team from October, 1983 to December, 1984, and following that assignment, he was transferred to the Office of the Assistant Comptroller General for Operations; (2) his rating received from the prior regional manager Dave Sorando indicated that he was cooperative with management; and (3) about one-third of the staff of the Boston Regional Office nominated him for an award during the Layton tenure for the positive impact he had in improving both staff relations and the work environment in the Boston Regional Office. He stated that "there is no performance-based reason for his reassignment to Washington and that the reassignment is a form of pressure to force him to retire and, as such, constitutes age discrimination." (Agency Exhibit 3, Part 2, Exh. 20; Petitioner Exhibit 6).

The Petitioner also contends that the fourteen (14) month PAQRS assignment to Washington, made against his wishes several months before his eligibility to retire, followed by a permanent transfer subsequent to his having obtained retirement eligibility, were actions "to force him to retire" and not attributed to his inability to perform effectively in Boston (Tr. Nov. 13, page 14, lines 10-14; Agency Exh.

3, Part 1, Report of Investigation). Additionally, he asserts that from July, 1983 until his PAQRS assignment three months later, Mr. Myers provided him no work and, in fact, gave him a de-facto demotion (Petitioner Exhibit 9, Oct. 31, 1985).

The Petitioner seeks reinstatement in the Boston Regional Office at GS-15 level with all lost benefits restored and reimbursement of legal fees.

The issue before the Personnel Appeals Board as agreed upon by both the Petitioner and the Respondent is as follows:

"Was the Petitioner's age a "determining factor" in the Agency's directed TDY and reassignment actions, and did the directed actions amount to a constructive discharge of the Petitioner? (Tr. Oct. 28, page 23, lines 12-15; page 24, lines 19-23). Were the actions of the Agency for legitimate management purposes?"

PRIMA FACIE CASE

In almost all cases brought under the Age Discrimination in Employment Act (ADEA) the order, allocation, and standards of proof set forth in McDonnell Douglas Corp. v. Green apply. 411 U.S. 792, 5 FEP 965 (1973). To prove a case of age discrimination, the Petitioner must establish a prima-facie case by demonstrating that:

1. He was in the protected age group at the time the contested action was taken;
2. He was qualified for the position from which he was relieved;
3. He was adversely affected by an employment decision or practice of the employer;
4. The employer sought or hired a person under 40 years of age with the same or similar qualification as those of the Petitioner.

The Petitioner, in addition to age discrimination, has alleged that the Agency's directed TDY and reassignment actions, in conjunction with his age, amounted to a constructive discharge. Proof of a constructive discharge occurs if working conditions are so difficult or unpleasant that a reasonable person would have felt compelled to resign. Downey V. Southern Natural Gas Co., 649 F. 2d 302, 26 FEP 550 (5th Circuit 1981). This allegation of constructive discharge by the Petitioner will be examined to determine whether, based upon the record presented to the Board, the working condition was such that it violated the conditions or terms of employment specified in Title VII.

a. Age

There is no dispute that the Petitioner, who was 58 years of age, was in the protected age group, (40 to 70 years of age) specified in the ADEA at the time the reassignment action was taken by the Agency (Agency Exh. 3, Part 1, Report of Investigation).

b. Qualifications

The Petitioner has shown that he served on the BRO management team for fifteen (15) years, and he was an ARM from 1970-1985. At the time of his retirement, Mr. Carbone had over 33 years service (Tr. Nov. 6, page 219, lines 5-11). The Agency refers to elements of the performance appraisals of Mr. Sorando and

Mr. Lucas, two former regional managers of the BRO, as reasons why Mr. Carbone's performance necessitated his reassignment. Mr. Sorando stated, however, that Mr. Carbone's overall performance as an ARM was average or above (Tr. Oct. 29, Page 182, lines 7-9). Also, he stated that at no time was Mr. Carbone's conduct such that he would recommend him for transfer out of the BRO (Tr. Nov. 6, page 213, lines 11-24). Mr. Lucas stated that Mr. Carbone's performance was good and fully successful (Tr. Nov. 6, page 213, lines 11-24). The record indicated that Mr. Carbone was qualified for the position from which he was relieved.

c. Adverse Affect of Reassignment Action

Mr. Carbone, was a 56-year old Assistant Regional Manager, GS-15, of the Boston Regional Office, whose overall performance ratings were appraised as being fully successful by Mr. Sorando (Tr. Oct. 29, page 182, lines 7-9) and Mr. Lucas (Tr. Nov. 6, page 213, lines 11-24). After reorganization considerations by the R.M. of the BRO and Mr. Fee relative to the management staff of the Boston Regional Office, Mr. Carbone was reassigned from a supervisory Evaluator position (ARM) to a non-supervisory position of Management Analyst, GS-15, in the Office of the Comptroller General for Operations, GAO Headquarters, Washington, DC (Agency Exhibit 3, Part 2, Exh. 22). The action involved a permanent change of station for Mr. Carbone. The case Endres v. Helms, the U.S. District Court, D.C., No. 832573, August 22, 1985 states that "transfer of a 58 year old GS-15 FAA Chief of Operations in Washington, DC to a GS-15 position as branch chief of FAA's airport division in Chicago, Illinois, qualifies as a personnel action and thus is within the scope of ADEA, regardless of whether such transfer qualified as adverse action for the purpose of the Civil Service Reform Act, since transfer from division chief to branch chief was a demotion," and thus made out the prima facie case. The demotion was an outgrowth of a reorganization. A similar situation is in evidence in Mr. Carbone's case in that he was reassigned from the BRO Boston, Massachusetts, to Washington, D.C. after a reorganization of the management staff of the BRO, and was demoted from an Assistant Regional Administrator, GS-15, to a Management Analyst, GS-15. Additionally, Mr. Carbone was told by Mr. Myers the new Regional Manager of the BRO, that he did not want him working with staff "because he cared too much for staff" (Tr. Nov. 5, page 58, lines 3-24), thus effectively isolating Mr. Carbone. Mr. Carbone complained that he was fifty-six years old, eligible to retire and had roots in Boston. The position to which he was being reassigned had no promotional potential, his wife refused to relocate at this stage of her life, and to relocate would generate a heavy financial burden on him (Tr. Nov. 13, page 15, lines 18-21; Petitioner Exhibit 9, Oct. 31, 1985; Agency Exh. 3, Part 2, Exh. 25-A; Tr. Nov. 5, pages 65-69; page 70, lines 3-24; Tr. Nov. 13, page 14, lines 10-15). The evidence indicates that Mr. Carbone was adversely affected by management's reassignment action.

d. Hiring of Employee Under 40 Years of Age with Similar Qualifications

On or about July 6, 1983, Mr. Carbone, an ARM in the BRO, was assigned to the Post Assignment Quality Review System (PAQRS) team - a fourteen (14)-month TDY assignment in Washington, DC (Tr. Nov. 5, pages 65-69). On July 10, 1983, Mr. Jan Goldstein, a former GS-14 of the Washington Regional Office, was appointed by Mr. Myers, as part of the reorganization of the management staff of the BRO, to the position of ARM for Operations GS-15, in the BRO. Mr. Goldstein was 37 years of age at the time, and had worked for Mr. Myers in Washington, DC. The request for promotion was initiated by Mr. Myers on May 5, 1983 (Agency Exhibit 3, Part 2, Exh. 23; Tr. Oct. 29, pages 306-308). Mr. Carbone began his fourteen-month TDY assignment in October, 1983. In October 1983, the same month in which Mr. Carbone's TDY to the PAQRS team became effective, Mr. Ken Croke was promoted to the position of

ARM for Planning and Development in the BRO. Mr. Croke was approximately forty-nine years of age at the time (Tr. Oct. 29, page 312, lines 13-24; page 316, lines 1-24; Agency Exh 3, Part 2, Exh. 25-A; Tr. Nov. 5, pages 65-69; page 70, lines 3-24). Mr. Myers stated that sometimes between June and October, 1983, he decided that Mr. Carbone would not be an acceptable member of the BRO management team - which was the "BOX" reorganization of the Office of the Comptroller General which all regional offices were required to mirror (Tr. Nov. 5, page 122, lines 2-15).

The Petitioner has made out his prima-facie case by showing that the management structure of the BRO was reorganized, and the Petitioner, though qualified to serve as a "BOX" ARM or a GS-15 Audit ARM, was not selected for any of the positions in the BRO. Instead, against his objections, he was reassigned to a position in Washington, DC, demoted from an ARM supervisory position to a non-supervisory position, and the positions in the BRO management structure were given to younger employees. The standards of proof, therefore, set forth in McDonnell Douglas Corporation v. Green, 411 U.S. 792, 5 F.E.P. 965 (1983) as a requirement to establish a prima facie case under the Age Discrimination in Employment Act have been satisfied.

IV. Agency's Articulated Non-Discriminatory Reasons for Action Taken

With the establishment of the prima-facie case, the burden shifts to the Agency to articulate some non-discriminatory reason for the actions taken in this case. The Agency satisfied this burden by stating to Mr. Carbone that its primary and on-going reason for the reassignment action was "due to the difficulties we have had over the years with your ability to establish and to maintain positive work relationships with both the management team and the staff in the BRO" (Agency Exhibit 3, Par 2, Exhs. 20, 21). Additionally, the Agency stated to Carbone that "your successful performance since October, 1983 in Washington on the Post Assignment Quality Review Team demonstrates that your permanent reassignment from BRO to Washington will contribute significantly to the efficiency of GAO" (Agency Exhibit 3, part 2, Exhibit 21-C). In his third reason for reassigning Mr. Carbone, Mr. Fee stated to Carbone that taking "into consideration our conversations subsequent to September 24, and the projected workload and needs of both the BRO and the Office of the Comptroller General, it is my judgment that you will be able to contribute most to the mission of the GAO working for me in Washington, DC." (Agency Exhibit 3, Part 2, Exh. 21-A). The Agency emphatically stated, however that "the projected workload in Mr. Fee's office is the reason that Mr. Carbone was transferred to Washington, DC rather than to someplace else in GAO; however, it is not the reason he was transferred out of Boston..." The Agency stated that Mr. Carbone had to be reassigned out of Boston" in order to put a stop to the management problems that had plagued Boston for years" (Tr. Nov. 13, page 19, line 25; page 20, lines 1-23). Also, the Agency stated that Mr. Carbone's turning down a bona-fide offer from the regional manager was an act of insubordination (Tr. Nov. 5, pg. 57, lines 15-24).

In response to the Agency's articulated non-discriminatory reason for the actions taken, Mr. Carbone stated that "there is no performance-based reason for his reassignment to Washington, that he believes that the reassignment is a form of pressure to force him to retire and, as such, constitutes age discrimination" (Agency Exhibit 3, Part 2, Exhibit 20). The Agency actions are examined on the basis of the evidence as a whole to determine (1) whether the Petitioner has met his burden of persuasion to demonstrate that the Agency's articulated reasons were mere pretext, or (2) the reassignment action was, in fact, a determinative reason in his age discrimination complaint

V. DISCUSSION AND ANALYSIS

The Agency stated that the on-going reason for the reassignment of the Petitioner was "due to the difficulties they have had over the years with his ability to establish and to maintain positive work relationships with both the management team and the staff in the BRO" (Agency Exh. 3, Part 2, Exhs. 20-21).

The Agency contends that the perception of the staff was that the Boston Regional Office (BRO) consisted of three mini-regions, each operating under an individual ARM. This concept, the Agency contended, generated problems in staff relationships relative to work assignments, staffing, promotion, and travel; and additionally, contributed to an atmosphere of fear, intimidation, and suspicion in the workplace. The Agency contended that Mr. Carbone had major responsibilities for these problems (Tr. Thurs. Nov. 13, page 24, lines 15-22; Tr. Oct. 28, page 83, lines 20-24; page 84; Tr. Oct. 28, pages 56-57; Tr. Oct. 29, page 10, lines 1-24; Tr. xr. 30, page 229-230).

The Agency also contended that Mr. Carbone failed to function effectively as a member of the BRO management team and did not support management initiatives and management in general over a period of years (Tr. Oct. 30, page 213, lines 4-24). Allegations in this regard pertained to Mr. Carbone's performance under a succession of regional managers - Mr. Layton, Mr. Sorando, Mr. Lucas, and Mr. Myers. (Tr. Oct. 30, pages 217-223; page 242, lines 1-24, page 198, lines 5-24; Oct 31, pages 71-72; Oct. 29, pages 9-51). His performance under Mr. Sorando was considered as being most damaging (Agency Exhibit 3G, Mr. Carbone's Affidavit; Tr. Nov. 6, page 3).

Mr. Carbone contended that he performed well in Boston, had the respect of the staff, and exhibited an unquestioned technical ability (Tr. Nov. 13, page 14, lines 16-21). These areas - staff relations and management relations - as they pertain to Mr. Carbone's performance, are examined in turn.

VI. Staff Relations

1. Interactions: Statements by Subordinate Staff Members.

At least twelve (12) staff members other than consultant and supervisory personnel presented testimony concerning Mr. Carbone's interactions with staff members at the BRO. Their testimonies do not support the Agency's contentions. Excerpts from some of the testimony given are as follows:

(1) One of the best technically qualified individuals he had ever come across; "as a manager, he gave us tremendous opportunity; had the ability to interact with BRO staff and Washington" (Tr. Oct. 28, pages 53 and 54).

(2) Mr. Carbone was a "good manager, very technical, very capable, good-very good. Ability to interact with BRO staff and Washington staff were very good, very good" (Tr. Oct. 28, pages 110, 111).

(3) Assessed Mr. Carbone's job management and technical capabilities as "outstanding," and his ability to interact with BRO staff and Washington staff "was just excellent" (Tr. Oct. 28, pages 135-136).

(4) Mr. Carbone's overall job management and technical skills were outstanding, and the witness didn't "think there was a person in the entire GAO that met and dealt with people better than Mr. Carbone" (Tr. Oct. 28, pages 140-142).

(5) Mr. Carbone's interaction with other BRO staff and Washington staff was "absolutely fine. Was the best (from this witness' perception) of the three ARM's" (Tr. Oct. 28, page 241). This witness also stated that in a conversation between him and Mr. Layton (the PM at the time) about the three ARM's, Mr. Layton stated that "if you walk through the regional office, you can tell who is working for each ARM... Foley's people look scared shitless, Lucas' people got their heads down like they are afraid to look up, and Carbone's people seem rather relaxed and kind of carefree and doing their job" (Tr. Oct. 28, page 244, lines 17-24; 245, lines 1-5).

(6) One employee (a current ARM) stated that his relationship with Mr. Carbone was fine, that he had no problems with Mr. Carbone. Additionally, he stated that Mr. Carbone interacted well with some staff and not so well with others (Tr. Oct 29, page 316, line 1-24; page 317, lines 8-11). The statement, "not so well with other" was characterized by the witness as being a few (Tr. Oct. 29, page 319, lines 1-9).

2. Statements by Regional Managers of Mr. Carbone's Relationship with Subordinate Staff

A. Mr. Sorando testified that Mr. Carbone had pretty good rapport with almost all of the staff, although there were a few people with whom Carbone like we all do, he stated had some trouble. But relationship with staff, he stated, by and large "were excellent" (Tr. Oct. 29, pages 174, lines 8-24; page 175, line 1). Mr. Sorando also stated that assessed "in terms of the timelines of products and projects Mr. Carbone was required to submit, your knowledge of the ongoing work...dealings with staff which traditionally in the field office has always been the primary manager responsibility, and managing staff" were, "overall, very good" (Tr. Oct. 29, page 175, lines 19-25; page 176, lines 1-4).

B. Mr. Fred Layton stated that Mr. Carbone was very friendly with staff and well liked by staff (Tr. Oct. 29, page 8, lines 6-9). Also he stated that the staff recommended Mr. Carbone for an award, which does reflect his popularity with staff... and stated that "I don't feel compelled to discredit that" (Tr. Oct. 29, pages 72-73).

C. Mr. Morton Myers stated that he considered the future role of Mr. Carbone to be that of an ARM. That it was clear from the material (given to him to read upon his appointment as the Regional Manager of the BRO) that Mr. Carbone could be affable and charismatic and was "just generally a technically competent individual who had those kinds of traits that's important" (Tr. Nov. 5, page 50, lines 9-24; page 51, lines 1-3).

D. Mr. Louis Lucas stated that he never had any problems in his dealings with Mr. Carbone (Tr. Nov. 6, page 121, lines 11-15). Also, he stated that "generally he could work with Mr. Carbone and was satisfied with Carbone's staff relations" (Petitioner Exhibit 9).

3. Three Region Perception by Staff and the Impact on Promotion, Staff Assignment, Travel, Secretarial and Administrative Problems; and the Generation of Fear, Suspicion, and Distrust in the Boston Regional Office.

There was a recurring theme in the BRO that the ARMs had developed their own mini-regional offices within the Boston Regional Office (Tr. Oct. 30, page 21, lines 10-20). The Agency contended that the mini-region concept enveloped feelings of rivalry that had an impact on employee morale in that employees felt that each ARM controlled factors relative to work assignments, promotions, travel, and secretarial and administrative matters for his operations (Tr. Oct. 30, page 22; page 23, lines 1-8).

(1)Subordinate Staff Concepts

a. One employee stated that there were problems in the BRO but he thought the problems were the fault of the regional manager and the three 15s. He felt that the three 15s had their own territories, grabbed their own people, wanted their own jobs, and instead of working for the good of each other, they had their own turf (Tr. Oct. 28, page 164, lines 12-24). A secretary stated that there were problems in the BRO and problems among the administrative staff, that Mr. Carbone did not contribute to the problems among the administrative staff, but that there was an overall management problem (Tr. Oct. 28, page 177-178).

b. One employee stated that as one of the ARMs in the office, Mr. Carbone was considered the most outgoing, most friendly, and probably the most approachable - and probably the one she enjoyed the most (Tr. Nov. 5, page 250, lines 1-18). She also stated that the feeling among the staff "was that Nick took care of his people and fought for his people and pressed his people forward in a promotion environment" (Tr. Nov. 5, page 251, lines 1-4). She testified that Mr Carbone had oversight responsibility for travel, the travel regulations, and the BRO travel overseer (Tr. Nov. 5, page 254, lines 18-22). There were times, she stated, when the staff felt that policies were enforced too harshly or policies would change from their perception (Tr. Nov. 5, page 255). She also stated that at one time, the Regional Manager, Mr. Sorando, instructed her to put her travel order, which included authorization for a rental car, through him because two of the ARMs objected to the authorization of a rental car in Washington (Tr. Nov. 5, pages 256, 257, 258). This witness also stated that she had never witnessed a meeting in which promotion were discussed but said that the comments that "Nick did fight for his people or did support his people" was meant as a compliment by the individuals who made the statements (Tr. Nov. 5, pages 263, lines 7-24; page 264, lines 1-16).

c. One employee stated that where Mr. Carbone questioned costs on vouchers, he had a tendency to discuss these questions with other people that were not involved (Specific individuals were not identified). (Tr. Nov. 5, page 272, lines 12-22). Also, the employee stated, you had to be a part of the "in-group" to get ahead in the office, and that if you couldn't be a part of the in-group, you just felt left out. He stated that he was in that situation (Tr. Nov. 5, page 244, lines 1-5). Under cross-examination, this employee stated that he socialized with Mr. Carbone, and went on hunting and fishing trips with him, not to establish a basis for promotion but basically because he liked Mr. Carbone as a person (Tr. Nov. 5, page 286, lines 19-24; lines 287 lines 1-10). Also, the employee stated, the problem he had with Mr. Carbone about the employee's travel voucher was brought to Mr. Carbone's attention by the travel clerk who had questions about the information and data it included (Tr. Nov. 5, page 286, lines 6-18). Additionally, the employee stated that he was never given an opportunity to work for Mr. Carbone, that he believes that Mr. Carbone personally selected the people to go overseas, and that he believes that Mr. Carbone had the say as to what people worked for him and would continue to work for him from assignment to assignment (Tr. Nov. 5, page 287, lines 15-24; page 288 lines 1-11). In response to a question from the Presiding Member, this employee stated that perhaps, except for out-of-the ordinary situations, Mr. Carbone had no responsibility to question items on travel vouchers. He stated that the BRO had travel clerks who should have been in a position to question any violations made on travel orders (Tr. Nov. 5, page 289, lines 12-24).

d. One employee who was formerly the administrative officer for BRO stated that the Regional Manager had told her that Mr. Carbone would be in charge of travel (Tr. Nov. 5, page 293, lines 13-17). She also stated that she had problems with the secretaries pitching in, but she never told Mr. Carbone of problems with his secretaries - 25 secretaries did not function under her jurisdiction, Mr. Carbone's secretary did a lot of typing from the typing pool (Tr. Oct 31, pages 300-305). This employee also stated that Mr.

Carbone published a travel document that was never coordinated with her, even though she was the Administrative Officer. She stated that she didn't know how the document came into being. In answer to a question from the Presiding Member, Mr. Carbone state instructed him to write the travel policy manual or have it done (Tr. Nov. 5, page 302; page 503, lines 1-7).

(2) Management Staff Perceptions of the Boston Regional Office Organizational Structure

a. Mr. Brandon. In commenting on the operational structure of the Boston Regional Office, Mr. Felix Brandon, Director of Personnel, GAO, stated that he thought "the situation in the Boston Regional Office at the time Mr. Layton was the Regional Manager had evolved from the management style of the previous regional manager, and my understanding, not having known the person, but my understanding was that his management style was to have his assistants do the work of the office, and that he delegated to them full authority to get the work done and was dependent upon them to make sure that everything was done properly. As a result of that, the office, to my understanding, was divided up into three segments - one for each of the Regional Managers, and that they then took the responsibility of running their particular segments. And when the new Regional Manager came in he wanted to manage the Region... and the Regional Assistants were not willing to relinquish the role" (Tr. Nov. 5, page 230, lines 19-24; page 231, lines 1-12). Mr. Brandon stated that it was his understanding that Mr. Layton who was the Regional Manager at that time, was having frequent meetings with the ARMs and telling them how he wanted the organization to operate and exactly what he saw as the way each of the ARMs would be handling his duties (Tr. Nov. 5, page 234, lines 21-24; page 235, line 1). These statements, however, do not appear to be based upon Mr. Brandon's personal observations.

b. Mr. Layton. Another witness, Mr. Yazbek, stated that during Mr. Layton's tenure, the witness had discussions with Mr. Layton concerning the ARMs, and that Mr. Layton said that he was having some problems with the Assistant Regional Managers in getting them to do what he wanted them to do. Mr. Yazbek stated, however, that Mr. Layton told him that he had never told the ARMs what he wanted them to do - that he tried to show them by his example.

Mr. Yazbek stated that it was during this particular two-hour conversation that Mr. Layton assessed the working demeanors of the employees, discussed earlier, who worked for each of the ARMs (Tr. Nov. 5, page 243, lines 10-24; page 244; page 245, lines 1-5). In addition to Mr. Yazbek, Mr. Carbone testified that Mr. Layton never said anything to the ARMs, but he did say things to other staff and it got back to the ARMs. Mr. Carbone stated that it is difficult to change a style when the individual responsible for the office doesn't voice his specific concern (Tr. Nov. 6, page 224, lines 1-16). Mr. Layton verified that the conversation between him and Mr. Yazbek did take place by testifying that Mr. Yazbek was in a staff position, reported directly to him, and explained to him that Mr. Eder, his predecessor, organized the office to operate as three separate entities, then basically withdrew from the operations. Mr. Layton stated that "to their credit, to some extent, the three ARMs assumed control of the office and somewhat filled the void; but in his opinion, they took that a little too far, and when we tried to change that, because I wanted to be involved in the operations of the office and in the key decisions, I met great resistance from them. They had a power base that they wanted to maintain, and that was a cause of a lot of the problems while I was here."

c. Mr. Lucas Mr. Lucas, a former Acting Regional Manager of the Boston Regional Office and an ARM for many years, stated that there may have been a perception that there were three mini-regions within the Boston Regional Office, but he "would disagree" that it was so. He stated that the perception may have

come from the fact that each ARM was assigned different areas of work--for example, he said, the health area was assigned to him, and the defense area was assigned to Mr. Foley. Additionally, he stated that the ARMs in Boston never set policy for travel and promotions, as was perceived by the staff that these types of policies were consistent throughout the Boston Regional Office, and that the Regional Manager set the policy (Tr. Nov. 6, page 141, lines 22-24; page 142; page 143, lines 1-3). Also, Mr. Lucas stated that assignments coming into the Regional Office were staffed and assigned by the Regional Manager to an ARM. He stated for example, that Mr. Eder, a former Regional Manager, would meet with the three ARMs; assign the project to an ARM; "and after discussions that we held concerning the complexity of the assignment, the staff development needs, staff that was available, travel needs on the job, and so forth," the Regional Manager would designate the individuals who were going on each assignment. He stated that the same procedures were followed under each Regional Manager - Mr. Layton, Mr. Sorando, and Mr. Lucas. This testimony differs from the perceptions voiced by the subordinate staff (Tr. Nov. 6, pages 142-143), Mr. Brandon, and Mr. Fee.

d. Mr. Sorando, another Regional Manager under whom Mr. Carbone worked, stated that "the role that an Assistant Regional Manager pursued was by and large dictated by his Regional Manager, including those situations where a Regional Manager allowed the ARM to carve out the role for himself" (Tr. Oct. 29, page 174, lines 2-7). Mr. Sorando stated that under his regime there had been a switch in the emphasis on Regional Manager/Assistant Regional Manager relationships which had prevailed for about a decade, and that there has been a growing degree of acceptance and accommodation, (of the changes). He stated that "he must add that at no time did the aggrieved parties rebel or become insubordinate. They are too professional for that" (Agency Exh. 3, 4H). He also stated that the ARMs' role was clarified; "they have become invisible to staff, which is welcome news indeed; and they are more involved in working with the Regional Manager in such activities as program planning and implementing various staff functions." (Agency Exh. 3-4H). This appraisal of the demeanor of the ARM's differs considerably from that cited by Mr. Layton (Tr. Oct. 29, page 10, lines 8-14), Mr. Owens, Mr. Brandon, and Mr. Fee.

e. Others. At least two GS-14s in the Boston Regional Office testified concerning staff viewpoints on the organizational structure of the Boston Regional Office. One stated that the problems in the office go back to the time when Mr. Eder was the Regional Manager and the ARM positions were established. He stated that operating divisions and accountant -issue areas were divided among the ARMs, and an ARM was responsible only for the area assigned to him. This employee stated that the Regional Manager, Mr. Eder, "pretty much let those ARMs control their particular area of expertise," and people assigned to a particular area stayed in that area over and over - thereby ending up with three regional offices within one (Tr. Oct. 28, page 55, lines 8-24; page 56, lines 1-16). This staff member stated that the organizational change under Mr. Layton, (who followed Mr. Eder as Regional Manager) that is the Core Group Organization, actually solidified Mr. Eder's mini-region concept in that the ARMs had the same responsibilities for certain issue areas and certain operating divisions, and the core groups were locked into a specific issue area. Therefore, he continued, the problems inherent in the perception of three regions in the office continued as a result of the actions of Mr. Layton (Tr. Oct. 28, page 57; page 58, lines 1-16).

The other GS-14, Mr. Connal, also stated that there was a perception among the Boston Regional Office staff that there were three offices within BRO (Tr. Nov. 6, page 76, lines 10-12). He states that the cause of this perception was attributable to the organizational structure - three ARMs, each responsible for different job areas, with core people assigned to them. He stated that the establishment of the Core Group concept institutionalized the three-office perception (Tr. Nov. 6, page 77).

4. Environment of Fear and Distrust In Region. In additional support of its allegations, the Agency stated that intimidation, fear, and suspicion were present in the region. Mr. Myers stated that the documents given to him for review at the time of his appointment as Regional Manager all talked about fear, bad relations, and inability to work together (Oct. 31, page 167, lines 19-22). The Agency stated that Mr. Carbone, by not striving to improve working conditions in the Region, contributed to these conditions--that he was argumentative, emotional, pointed, and not supportive. The Agency stated that this behavior was manifested by his standing up when someone was talking, interrupting, jumping up in situations, speaking outright and direct, showing anger, and non-verbal behavior (Tr. Oct. 31, pages 68-70). This behavior is alleged to have been observed at both operational meetings and group meetings, such as the one in Provincetown, where discussions or topics such as the "team concept" of organization were in progress (Tr. Oct. 31, page 71, 72).

(1) Comments of Subordinate Staff. Of the subordinate staff to whom a direct question was asked as to whether they believed that Mr. Carbone created fear, intimidated the staff, did not get along with staff, or generated in the staff a fear of reprisal or distrust all, generally, responded in the negative (Tr. Nov. 6, page 74, lines 5-20; Oct 28, page 54, lines 15-21; page 143, lines 1-14; pages 110-111; page 135-136; pages 140-142; page 177, line 1; pages 222). During this period, also, Mr. Carbone was recommended for an award "in recognition of the positive impact he had on improving staff relations and the work environment within the regional office, as well as the significant contributions has have made to the professional growth and quality of BRO staff." Additionally, the recommendation stated that Mr. Carbone has been rewarded for technical competence through the promotion mechanism, but "technical competence does not make a manager. It is because of Mr. Carbone's sustained excellent leadership qualities and managerial performance that we nominated him for a Certificate of Appreciation." The recommendation was signed by 33 members of the BRO staff; yet, the Agency stated that Mr. Carbone as part of the management team, was a cause of the suspicions and other related conditions among subordinate staff.

(2) Mr. Sorando's Comments. Mr. Sorando, who was the Regional Manager at that time, assessed the performances of the ARMs, generally, individually rather than as a group or entity. His assessment of an ARM other than Mr. Carbone (Agency Exh. 3, Part 2, Exh. 8) in regard to generating fear among subordinate staff, is compatible with the generalized assessment of the Agency as follows:

The cooperation he has obtained from the BRO staff has been exacted at a considerable price over the years, to the point where all of regional management in BRO is generally seen by the staff as an adversary rather than as a support mechanism. (Agency Exh. 3, part 2, Exh 8, Paragraph 2, Cooperation). (Underlining for emphasis).

This portion of the appraisal implies that this ARM, not Mr. Carbone, is the root cause of the problems conceived by subordinate staff. In other areas of the performance appraisal of this particular ARM, Mr. Sorando made the following statement:

The region is awash with fear, suspicion, intimidation, distrust, suppressed anger, even hatred. When people are willing to discuss these feelings, they invariably cite Mr. _____ as one of the principal reasons for this condition. (Agency Exh. 3, Part 2, Exhibit 8, par. 8, Effective Working Relationship).

Mr. Sorando continues his assessment of this ARM as follows:

I have learned that the main reason the staff is quite vocal in its dislike of Defense work (for which this ARM is responsible) is that they do not want to be associated with Mr. _____). He has a well known history in BRO, for abusing staff, showing intolerance, creating stressful situations, and given to outbursts of temper. I have personally observed and am aware of such behavior on his part.

It is not a healthy state when staff are terrified at the prospect of being associated with a particular ARM and when senior staff readily acknowledge their fear and intimidation by the ARMs...As the senior ARM in BRO 15 years, this ARM must take some major responsibility for the hostile climate existing here... I am particularly critical of his targeting the Administrative Officer and members of her staff. (Agency Exh. 3, Part 2, Exh. 8, Par. 8, Effective Working Relationships).

An analysis of Mr. Carbone's performance assessment by Mr. Sorando in these same areas indicates the following: (Agency Exhibit 3, Part 1, Exh. 1D).

One's early reactions to Nick's behavior would suggest some lack of cooperation on his part. On further analysis though, it becomes clear that he actually is very cooperative; he just doesn't sound that way... I've found Nick to be very cooperative. Among the ARMs he consistently responds best to requests about matters pertaining to staff, travel, job status, etc... (Paragraph 2, Cooperation).

Nick's rigorous pursuit of a questionable item in a travel voucher, if only a couple of times, will have much of the staff convinced he will pore over their vouchers in minute detail and then leave no stone unturned to correct any discrepancies no matter how small. This is not true, but the staff believes it of Nick because it has happened once or twice. One of his GS-14s, on a hot late summer day removes his tie in the office and Nick reads him the riot act. The GS-14 becomes so upset he takes leave for the rest of the day, and the staff is reinforced in its impression that Nick is a tyrant (Par. 8, Effective Working Relationships). Underlining for emphasis).

The climate in the BRO is anything but at robust healthy levels, and incidents such as these, while not the major causes of the problem have contributed to some degree. They certainly don't help. In an atmosphere charged with suspicion, fear, intimidation, etc., the ARMs (1) have to be seen as contributing to it and (2) are in a position to ameliorate conditions. (Par. 8, Effective Working Conditions) (Underlining for emphasis).

From Mr. Sorando's assessment the indications are that another ARM, not Mr. Carbone, must take major responsibility for the hostile climate existing in the Boston Regional Office at that time. The Assessment indicates that, in the opinion of Mr. Sorando, Mr. Carbone is not a tyrant, and that the impression of some of the staff that he will "leave no stone unturned to correct any discrepancy, no matter how small" is not true. Mr. Sorando also stated that the incidents cited in reference to Mr. Carbone are not the major causes of the problems in BRO (Agency Exhibit 3, Part 1, Exh. (D).

(3) Other Comments. Mr. Lucas, who was an ARM of BRO at the time Dr. Hillman was making his assessment of Mr. Carbone's behavior at meetings Dr. Hillman said he (Hillman) attended, stated that he did not remember Dr. Hillman attending any of the operational meetings of the BRO management group - the ARM's and the Regional Manager, for example. Mr. Lucas testified that "the only thing I remember him on is when we dealt with the questionnaire or we dealt with the Organizational Development Project that he was working on. He would meet with us as a group a couple of times, but as far as day-to-day

working activities were concerned, what you call operational meetings, I don't think he had anything to do with those at all" (Tr. Nov. 6, page 139, lines 17-24; page 140, lines 1-6). Mr. Lucas also stated that in the course of a period of thirteen or fourteen years, he probably attended 1,500 or 2,000 meetings with Mr. Carbone; and during that period, in-so-far-as he can remember, he never saw Mr. Carbone jump to his feet during a meeting - "not even once" (Tr. Nov. 6, page 141).

VII. Management Relations.

One of the expectations for an Assistant Regional Manager is that he must work cooperatively with other members of the regional management team. In addition to the allegation that Mr. Carbone failed to maintain positive work relationships with the Subordinate staff of the Boston Regional Office, the Agency alleged that over the years he failed to maintain a positive work relationship with the management team in BRO and that he did not support management initiatives and management in general under a succession of Regional Managers - Mr. Layton, Mr. Sorando, Mr. Lucas, and Mr. Myers (Tr. Oct 30, pages 212,213, 198; Agency Exhibit 3, Part 1, Exhibit 1-D).

a. Mr. Francis Fee. Mr. Francis Fee, former Assistant Comptroller General for Operations, GAO, stated the alleged nature of the problem in the BRO as follows:

(1) The ARMs did not work in a cooperative and supportive way with the Regional Managers; and that if a Regional Manager wanted to do something and the ARMs did not like doing it, it didn't get done. Also, Mr. Fee stated that the technical audits were being done but the establishment of a strong management team to provide leadership and guidance to the staff was not being accomplished (Tr. Oct. 30, page 196, lines 16-24).

(2) Also, he stated that the concept of three separate offices within the BRO continued to exist, with each of the ARMs continuing to control the resources in their particular areas- pretty much doing things the way they wanted in order to get the job done (Tr. Oct. 30, page 197, lines 1-6). Mr. Fee stated that all ARMs contributed to the situation and that Mr. Carbone was a significant contributor in that he was negative about change, about initiatives, and about authority. He testified that "there were more things that Nick had problems with than there were thing he didn't have problems with" (Tr. Oct. 30, pages 197, 198). Also, Mr. Fee stated that Mr. Carbone would argue as to whether a particular course of action is the right or wrong action, then relay those reservations to subordinate staff, which Mr. Fee felt was inappropriate for a person at that managerial level (Tr. Oct. 30, page 198, lines 12-24).

Mr. Fee also stated that "the job of the ARM is to work with the Regional Manager to come to the best possible decision but that "he held the regional manager accountable for making the decision and implementing it. I didn't hold the ARM accountable for that. I held them accountable for helping him do it" (Tr. Oct. 30, page 206, lines 7-17). From his viewpoint, Mr. Fee stated, Mr. Carbone did not give that assistance (Tr. Oct. 30, pages 206; 207, line 1). Mr. Fee also stated that three Regional Managers under whom Mr. Carbone worked as an ARM had the same problem with Mr. Carbone and the other ARMs - they were not supportive of the regional managers' initiatives and resisted what the managers wanted to do (Tr. Oct. 30, pages 200-201; 212-213, 229). In response to a question by the Presiding Member as to specific incidents that reflect what Mr. Carbone did or did not do, Mr. Fee responded with terms such as "uncooperative" and "negative in his approach." Upon further questioning by the Presiding Member, Mr. Fee stated that "if it's (the incidents or examples) not in this record, I'm not going to recall it" (Tr. Oct. 30, page 337, lines 1-13).

b. Mr. Carbone. Mr. Carbone stated that he asked Mr. Fee how Mr. Carbone failed to foster good relationships. Mr. Carbone stated that Mr. Fee responded by stating "I do not have to give you specific examples. I am not going to talk about Layton, because Layton did have problems; and since you never worked for Myers, his tenure is not germane, but I will talk about Sorando, and his rating of you is sufficient" (Agency Exh. 3G; Carbone's Affidavit). Mr. Peterson stated that at the particular meeting at which these allegations about Mr. Carbone took place, he does not recollect Mr. Fee "ever acknowledging that Fred Layton had problems, but that it is true that the bulk of the discussion centered around a rating that Mr. Sorando had prepared on Mr. Carbone..." (Tr. Oct. 31, page 27, lines 19-24). Mr. Carbone stated that he was directed by Mr. Fee to give his assessments about BRO personnel, and that Mr. Peterson's notes on Carbone's responses reflect criticism for the statements made. Mr. Peterson stated that he did not investigate as to whether the things Mr. Carbone told him were correct or not (Tr. Oct. 31, page 32, lines 19-24). Mr. Peterson acknowledged that Mr. Carbone did what Mr. Fee directed him to do (Tr. Oct 31, page 39, lines 1-12). Mr. Fee, when asked to what he attributed Mr. Layton's failure, responded that Mr. Layton was not the strongest manager in the world and was clearly a part of the failure (Tr. Oct. 30, page 201, lines 1-13). Mr. Hillman, a consultant to the Agency, also stated that Mr. Layton did play a measurable part in the problem of the management team in BRO (Tr. Oct. 31, page 111 and 112). Mr. Carbone "maintains that the reasons given for his transfer have no substance and are a pretext for age discrimination." Mr. Carbone stated that he has "maintained good, if not excellent, relations with both staff and management and the respondent has presented no evidence to the contrary" (Respondents's Post Hearing Brief, page 11).

c. Mr. Layton. Mr. Layton, contrary to the comments of Mr. Fee that Mr. Fee had done so (Tr. Oct. 30, page 200, lines 10-24) stated that he was not briefed on any problems of the Boston Office prior to his arrival in 1976 (Tr. Oct. 29, page 8, lines 1-3). Mr. Layton stated that there was a lot of dissension between the three ARMs and between the ARMs and the R.M. and that Mr. Carbone was very friendly with the staff and well liked by the staff (Tr. Oct. 29, page 8, lines 6-9). Mr. Layton testified that when he tried to change the operational concept of the office so that he could become involved in the operations of the Office and its key decisions, he "met great resistance from the ARMs. "Mr. Yazbek, in turn testified that during his conversations with Mr. Layton, he asked Mr. Layton whether he ever told the ARMs what he wanted them to do. Mr. Yazbek stated that Mr. Layton responded "No." Mr. Yazbek stated, in response to another question from him as to why Mr. Layton had not told them, Mr. Layton responded, "I just can't do it, I try to show them by my example" (Tr. Nov. 5, page 243, lines 10-24; pages 244-245). On this same issue, and in response to a question as to whether he saw Mr. Layton taking initiatives to build the support of the ARMs, Mr. Fee responded "no" - other than what Mr. Layton had described to him up to that point in time (Tr. Oct. 30, page 201, lines 21-24; page 202, lines 1-4).

Mr. Lucas, an ARM under Mr. Layton, and later an Acting Regional Manager of the BRO, stated that the major problem Mr. Layton had in dealing with the ARMs was indecisiveness. He stated that Mr. Layton would insist that the three ARMs and the RM "agree on an issue, and if that did not happen, he would blame the group for not being able to function together...I have seen him express extreme emotion at some of these meetings. In one of the meetings, he broke down and cried" (Tr. Nov. 6, page 134, lines 12-24; page 135, lines 11-19). Mr. Carbone stated a similar observation, saying that Mr. Layton was insecure and a very weak man, and did not seem to relate to anything but total agreement. He testified that the ARMs worked together for many years and were use to speaking up to each other. They were very direct with each other, he stated, but after the meeting was over, that was the end of it (Tr. Nov. 6, page 223, lines 17-24; page 224, lines 1-16). Mr. Sorando stated that a lot of the problem in BRO lay at Fred Layton's door and that Sorando was not prepared to say that it was that much Carbone's problem (Agency Exhibit

3, Part 2, Exhibit 6)). Also, Mr. Sorando stated that "from what I understand and saw, Layton had trouble adjusting." He had "never been in a role where he managed something like a Region. He was sharp but he didn't have the experience" (Agency Exhibit 3, Part 2, Exhibit 6). Mr. Layton stated that Mr. Carbone "never refused to assist him when he was asked to do so" (Tr. Oct. 29, page 27, lines 14-22). Mr. Layton also stated that he never prepared a narrative appraisal of Mr. Carbone's performance. He stated that he used IBM cards that said simply satisfactory, unsatisfactory, or outstanding (Tr. Oct. 29, page 11, lines 10-18). Mr. Layton presented no testimony to the fact that he had given Mr. Carbone an unsatisfactory performance appraisal. Mr. Lucas also stated that Mr. Layton tried to undercut Mr. Carbone - "destroy his credibility and make him less effective in his position by telling me and other members of the staff that Mr. Carbone was involved with one of the female staff members. I do not believe there was any basis for him to say that - none whatsoever," Mr. Lucas stated (Tr. Nov. 6, page 132, lines 19-24). Mr. Lucas also stated that Mr. Layton told him that in addition to doing the organization study, Mr. Hillman was doing a special mission for Mr. Layton - to find out whether Mr. Carbone was involved with a female staff member (Tr. Nov. 6, page 151, lines 11-22). These statements were not denied by the Agency.

d. Mr. Owens. Mr. Owens was an Organization Development Specialist and was the on-site supervisor of the organization development effort designed to assist Mr. Layton with some of the management difficulties he was alleged to have been experiencing in the Boston Regional Office (Tr. Oct. 30, page 12, lines 1-5). Mr. Owens, reiterating Mr. Fee's statement (Tr. Oct. 3, page 197), stated that it was clear in many ways that the office was operating as three independent groups. Each ARM, he stated, "had different perspectives on what was important, what they were trying to achieve, how they used their staff, and where resources should be concentrated. And so there was considerable disagreement among them" (Tr. Oct 30, page 21, lines 10-15; page 24, lines 3-15). Mr. Owens was asked to provide "some examples of the types of across-the-board policy matters that the Regional Managers wanted to involve the ARMs in." Mr. Owens, responded that establishing criteria for promotions would be one (Tr. Oct. 30, page 26, lines 14-24; page 27). Mr. Owens also stated that the three ARMs were functioning independently and were setting these policies autonomously (Tr. Oct. 30, page 26, lines 14-23). This testimony, while compatible to a considerable degree with, for example, that of Mr. Brandon and some members of the subordinate staff (Tr. Nov. 5, page 230, lines 17-24; page 231, lines 1-12), is incompatible with that of Mr. Lucas, an ARM and a one-time Acting ARM of the Boston Regional Office. Mr. Lucas stated that the ARMs in Boston never set policy for functions such as travel, promotions and staff assignments, as was perceived by the staff, that these types of policies were consistent throughout the BRO, and that the regional manager set the policies (Tr. Nov. 6, page 141, line 22-24; page 142; page 143, lines 1-3). He stated that the same procedures were followed by each RM. Mr. Eden, Mr. Layton, Mr. Sorando, and himself (Tr. Nov. 6 pages 142-143). Mr. Lucas, as did others, stated that the organization of the office in which each ARM was assigned a specific area of responsibility may have led to the perception of three offices in one in BRO (Tr. Nov. 6 pages 141-142; tr. Oct. 29, pages 56-57). A statement was made by Mr. Owens to indicate that the promotion process and the telling of its results would be an example of a problem to which Mr. Carbone was a significant contributor. Mr. Owens stated that it would have been implicit among the members of the management staff that information on promotions would be confidential. Upon being questioned, however, he stated that he could not specifically attribute any disclosures of this nature to Mr. Carbone (Tr. Oct. 30, page 72; page 73, lines 1-3). Also, in the matter of expressions of disapproval which the Agency stated were made by Mr. Carbone on promotions after the promotion decision was made, Mr. Owens stated that based on information and other things that were going on in Boston, "I think his views were communicated to the 14-level as well as to people who were working immediately for him" (Tr. Oct. 30, page 83). No evidence of fact, however, was presented to support the implication that Mr. Carbone communicated these matters with staff. Nor was there evidence to support the implication that a

particular promotion action was discussed with staff where it should not have been. Mr. Owens stated that a manager should not be penalized for enjoying a popularity that allowed him to get a job done (Tr. Oct. 30, page 149, lines 23-24; page 150, lines 1-6).

e. F.O.D. Organization Study

In the course of an F.O.D. Organizational Study, Mr. Lou Rodriguez testified that he interviewed Mr. Sorando. A paragraph of the study entitled "Performance Appraisals and Counseling," contains the following statement: "However, the ARMs are not receptive to organizational change and are extremely difficult to work with; therefore, he limits their involvement to technical work only." The statement is attributed to Mr. Sorando, and is alleged to have been made to Mr. Rodriguez (Tr. Oct. 29, page 198-199). Mr. Sorando denied that the ARMs were extremely difficult for him to work with (Tr. Oct. 29, page 194, lines 10-14). Also, he stated that he does not recall what he told Mr. Rodriguez, and that the statements in the report "could have been Mr. Rodriguez' characterization of the conversation" (Tr. Oct. 29, page 199, lines 1-13). In response to an allegation in the study that states that Mr. Sorando said that he attempted to isolate himself from the ARMs, Mr. Sorando stated that his "association with the assistant regional managers in Cincinnati and in Washington was rather more involved than it was in Boston -- primarily for the reason that in Boston we were dealing with experienced people, and in Cincinnati and in Washington, we were not..." "Another reason" Mr. Sorando stated..."that there was a greater isolation in Boston is again getting back to the team concept which was operative in GAO at the time, and which effectively took the management of work assignments out of the hands of the regional manager and, indeed, out of the hands of the assistant regional managers. There was really--it's one of the reasons I retired. There was really very little reason for coming to work" (Tr. Oct. 29, page 199, lines 14-24; page 200, lines 1-17). Mr. Sorando, in essence, states here that it was the "team concept" of organization stipulated by GAO that isolated the regional manager and the ARMs - and not the attitude of the ARMs.

Mr. Sorando also stated that the F.O.D. Study "is not a statement by me. It is a statement by Mr. Rodriguez. It is a summary of however he took his notes and extended, and apparently extended, discussions with me." Mr. Sorando stated, further, that the document or study perhaps does not document an "interview that Mr. Rodriguez held with him" (Tr. Oct. 29, pages 210, lines 9-24; page 211, lines 1-10).

VIII. MR. CARBONE'S PERFORMANCE APPRAISALS

a. Mr. Sorando's Performance Appraisal. The Agency has stated that Mr. Carbone's transfer was due to his inability to maintain positive work relationships with management and staff (Agency Exh. 3, Part 2, Exhs. 20, 21). In support of this statement, both Mr. Fee and Mr. Myers cited Mr. Sorando's performance appraisal of Mr. Carbone as (1) evidence of Mr. Carbone's inability to get along with the staff and (2) a reason for his transfer from the Boston Regional Office to Washington, D.C. Mr. Carbone stated that Mr. Fee, in response to Mr. Carbone's question as to why Mr. Carbone was being transferred, indicated that "it has nothing to do with Layton's tenure... It has nothing to do with Myers, because you really haven't served under Myers... It's Sorando. It's the problems you had with Sorando." Mr. Carbone stated that he had no problems with Sorando (Tr. Nov. 6, page 293).

Mr. Fee stated, at one time during his testimony, that he directed Mr. Sorando to do a performance appraisal of Mr. Carbone because the Agency was getting into the cycle of doing one each year on GS-15s (Tr. Oct. 30, page 229, lines 5-23). At another time, Mr. Fee stated that he instructed Mr. Sorando to prepare a performance evaluation on each ARM because Mr. Sorando had voiced to him his frustrations with the ARMs, especially Mr. Carbone and Mr. Foley. He stated that Mr. Sorando's frustrations were

precisely the same as Fred Layton's--their inability to work together as a team; their non-support of initiatives; and management in general (Tr. Oct. 30, page 213, lines 4-24). The performance appraisal, Mr. Fee continued, indicated the nature of the problems Mr. Sorando stated that he had with Mr. Carbone (Tr. Oct. 30, page 215, lines 13-24; page 216, lines 1-6).

Mr. Myers, the current regional manager, referred to items 2, 6 and 8 of Mr. Sorando's performance appraisal of Mr. Carbone as evidence of Mr. Carbone's problems in establishing effective staff relationships (Tr. Oct. 31, pages 181-183). He stated that the appraisal spoke to aggressiveness and tough talk of the old school and "hit me as a threatening or dividing kind of approach - almost stylistic; the cooperativeness basically fits the same mold as six and eight" (Tr. Oct. 31, page 184, lines 1-18).

Mr. Sorando categorically disagreed with both Mr. Fee's and Mr. Myers' interpretations of Sorando's performance appraisal. In contrast to Mr. Fee's statement that Mr. Sorando had voiced to him his frustrations with the ARMs, especially Mr. Carbone and Mr. Foley (Tr. Oct. 30, page 229, lines 5-23), Mr. Sorando stated that he never complained to Mr. Fee about Mr. Carbone or any of the other ARMs (Tr. Oct. 29, page 184, lines 1-24). Also, Mr. Sorando states that the performance appraisal of Mr. Carbone was not given during a normal rating cycle. It was prepared, he testified, because of the desire to rate the ARMs sometime during Sorando's first year of tenure and to bring to Carbone's attention some problems for corrective action (Tr. Oct. 29, pages 178-181). Mr. Sorando stated that in several areas, Mr. Carbone's appraisal was "quite laudatory" (Tr. Oct. 29, page 181, lines 1-16); that in virtually all aspects, Mr. Carbone's performance as an ARM was average or better (Tr. Oct. 29, page 182, lines 7-9); and in another instance, he stated that "overall, Carbone's performance as an ARM was above average and was as good as that of any of the other ARMs. In dealing with staff, he was better than the other two men, but perhaps not as good as Joan McCabe" (Tr. Oct. 29, page 244, lines 3-22). The items of Mr. Carbone's appraisal referred to by Mr. Myers do not appear to have been assessed in totality by Mr. Myers. For example: In item 2, Cooperation, Mr. Sorando states that "One's early reactions to Nick's behavior would suggest some lack of cooperation on his part. On further analysis, though the assessment continues it becomes clear that he actually is very cooperative, he just doesn't sound that way. He has a way of arguing every point--big or small--and more often than not, he will make more of a situation than it deserves. His most frequent prefix in rendering a comment or an opinion is 'I've got a problem with that...' Generally, after some discussion, it develops that he didn't have a problem or maybe only a minor one. His tendency to make every situation sound terribly important and taking inflexible stands on each matter gives him the appearance of being uncooperative and intransigent. Actually, while it may not say too much for his value strata, this behavior is misleading. I've found Nick to be very cooperative. Among the ARMs he consistently responds best to requests about matters pertaining to staff, travel, job status, etc. He obviously gains the cooperation of headquarters staff because they keep coming back for more work in his area and they like doing business with him..." (Underlining for emphasis.) (Agency Exh. 3, part 1, Exh. D.) This statement, without reservation, assesses Mr. Carbone to be a very cooperative ARM and does not support the apprehensions voiced by Mr. Myers and Mr. Fee.

For item 6 (Oral Communication) of Mr. Carbone's performance appraisal by Mr. Sorando, it appears that Mr. Myers' comments again have failed to reflect fully and accurately the words and the intent of Mr. Sorando. Mr. Sorando depicts the manner in which Mr. Carbone addresses people as more a problem of style which reflects his culture than a desire to convey an authoritative and aggressive manner. Mr. Sorando states that he does not believe that Mr. Carbone means, or wants to convey, an impression of being authoritative, or tough as interpreted by Mr. Myers (Agency Exh. 3, part 1, Exh. D). In item 8 of his performance appraisal of Mr. Carbone, (Establishing and Maintaining Effective Working Relationships

with EEO), Mr. Sorando states that the incidents described and the perception of the staff that Mr. Carbone is a tyrant is not true. Also, Mr. Sorando states that these incidents have happened only a couple of times and are not the major causes of the problems within the Boston Regional Office; however, he stated they do not help. Additionally, as discussed earlier, Mr. Sorando cites one of the other ARMs as being primarily responsible for the unhealthy climate in the Boston Regional Office. By contrast, Mr. Sorando states, that on the EEO front, Mr. Carbone gets very high marks. He "sticks his neck out, frequently to his disadvantage, but in EEO matters, at least since I have been here it's been worth it" (Agency Exh. 3, part 1, Exh. D). Also, both subordinate staff and management staff, as discussed earlier, stated that Mr. Carbone got along very well with staff (Tr. Oct. 28, pages 53-54; pages 110-111; pages 135-136; pages 176-177; page 222; pages 241, 244, 245).

b. Mr. Lucas' Performance Appraisal. The performance rating which Mr. Lucas gave to Mr. Carbone (Agency Exh. 3, Part 1, 4M) was identified by Mr. Myers and Mr. Fee as additional support for the contention that Mr. Carbone shared responsibility for the management problems in the Boston Regional Office (Tr. Oct. 31, page 180, lines 5-24; pages 181-182; page 186, lines 10-24). Mr. Myers referred to a line in the rating that, according to him, seems to be asking for help in support of initiatives, management initiatives. "It seems to me," Mr. Myers stated, "to say that Mr. Carbone is criticizing the performance ability of people in front of other people, and these are again disruptive in terms of management responsibilities to an organization." The performance appraisal was written on July 15, 1983, and Mr. Myers notes that he was not the Regional Manager at that time, but that he was reviewing documents from the files before assuming his responsibilities as Regional Manager of the Boston Regional Office (Tr. Oct. 31, page 173, lines 13-23; page 188, lines 3-6). The record does not indicate that Mr. Myers witnessed incidents of this nature.

Mr. Fee stated that the performance appraisal of Mr. Lucas on Mr. Carbone indicated that Mr. Lucas had experienced the same difficulties with Mr. Carbone as were experienced by the previous Regional Manager. Mr. Fee specifically cited the narrative on page 2, last paragraph, of the performance appraisal, as evidence of Mr. Carbone's inability to enthusiastically support regional management initiatives (Tr. Oct. 30, page 229, lines 5-24; page 230).

The paragraph in the performance appraisal to which the remarks of Mr. Myers and Mr. Lucas are directed (last paragraph, page 2) is as follows:

There are a couple of developmental needs worthy of mention. To help the region maintain a more positive and effective work environment, for example, he should exercise more caution as to avoid criticizing the performance or ability of one employee of the office to other employees of the office. He should also strive to look at the positive aspects of GAO and the Regional Office, rather than the negative, and more enthusiastically support regional manager initiatives.

The comments of Mr. Lucas concerning the nature and the meaning of his appraisal of Mr. Carbone's performance differs from the conclusions drawn by Mr. Myers and Mr. Fee in terms of Mr. Lucas' reasons for making the remarks in the last paragraph of page 2 of the performance appraisal. The following statements by Mr. Lucas are not in conformance with the assessments made by Mr. Myers and Mr. Fee.

Mr. Lucas:

a. States that he never received any complaints that Mr. Carbone had criticized certain staff members to other staff members. "I observed his doing so on one occasion and brought the matter to his attention" (Tr. Nov. 6 page 202, lines 4-10; page 208, lines 15-24; page 209; page 210, lines 1-5).

b. Noted under cross examination by the Agency that his statement on Mr. Carbone's performance appraisal that Mr. Carbone could help the region maintain a more positive and effective work environment..."was made in the context of counseling Mr. Carbone to exercise more caution so as to avoid criticizing one person in front of another. In that context (he stated), not...(improving) the work environment in a general sense" (Tr. Nov. 6, page 214, lines 21-24; page 215; page 216, lines 1-5).

c. Stated that Mr. Carbone got along well with staff, that he is a well-respected person, and that he is a good person (Agency Exh. 3, part 2, Exh. 7, Affidavit of Louis Lucas).

d. Stated that he did not have any problems in his dealings with Mr. Carbone and never complained to Mr. Fee about Mr. Carbone's performance (Tr. Nov. 6, page 125, lines 5-10).

e. Stated, also, that during his counseling session with Mr. Carbone on his performance appraisal, he brought to Mr. Carbone's attention his habit of focusing on negative aspects of employment (Tr. v. 6, page 210, lines 6-14; page 213, lines 11-24). Mr. Lucas also stated that he gave Mr. Carbone a "fully successful" rating on his performance appraisal, but added what he considered to be an appropriate critique to bring about corrective action (Agency Exh. 3, part 2, Exh. 7, Affidavit of Louis Lucas; Tr. Nov. 6, page 213, lines 11-24).

The rating received by Mr. Carbone, and the clarifying comments made by Mr. Lucas and Mr. Sorando during testimony indicate that Mr. Carbone's performance under both Regional Managers was at least "fully successful" in all areas rated - even those in which counseling was given to bring about additional improvements. The record does not support the contention of Mr. Fee and Mr. Myers that the performance appraisals given to the Petitioner by Mr. Sorando and Mr. Lucas reflect problems with the Regional Manager and an inability or failure to support the Regional Managers' initiatives. The phraseology used in the critique was "to more enthusiastically support the regional manager initiatives"--inferring that enthusiastic support was present, but the Regional Manager felt that even more effort is desired.

c. Other Performance Assessments. In his capacity as the Regional Manager, Mr. Myers stated that prior to Mr. Carbone's assignment to PAQRS, he had been exposed to Carbone's performance a total time of approximately two weeks only (Tr. Nov. 5, page 117, lines 11-24; page 118, lines 11-24). Mr. Myers also stated that for the several months during which Mr. Carbone was in the Regional Office and Mr. Myers was the Regional Manager, subsequent to July 24, and after the assignment to PAQRS until Carbone left, Mr. Myers had no problems (with Mr. Carbone's performance.) (Tr. Nov. 5, pages 123-124.) Mr. Myers referred to Mr. Carbone (and Mr. Lucas as well) as two incompetent ARMs (Tr. Nov. 5, page 44); yet based upon the record, as indicated from Mr. Myers' testimony, Mr. Myers had very little first-hand knowledge of Mr. Carbone's performance and effectiveness as an ARM; and based upon the knowledge he did possess, he stated that he had no problems with Mr. Carbone's performance. He stated that he obtained a great deal of his information from documents given to him to read. Mr. Layton, another Regional Manager under whom Mr. Carbone worked as an ARM, also stated that Mr. Carbone never refused to assist when he was asked to do so (Tr. Oct. 29, page 27, lines 14-22). Also, there was no indication in the record that he gave Mr. Carbone an unsatisfactory performance appraisal (Tr. Oct. 29, page 11, lines 10-18).

d. Discussing Information with Staff. Another performance-related area in which management stated that Mr. Carbone failed to support management initiatives pertained to the allegation of his discussing information with staff that should not have been discussed (Tr. Oct. 30, page 198, lines 12-14). The record indicates that this allegation originated during a conversation between Mr. Layton and Mr. Fee in which Mr. Fee stated that Mr. Layton told him that Mr. Carbone would have reservations about a course of action taken by the Regional Manager, and would relay these reservations to subordinate staff.

The record, however, indicates that management personnel could not identify specific examples of Mr. Carbone's behavior to support its allegations (Tr. Oct. 30, page 72; page 73, lines 1-3; page 83; Tr. Oct. 29, page 104; 105, lines 2-5). Actually, Mr. Layton stated that Mr. Carbone's behavior in regard to this allegation could better be characterized as interpreting things for staff, rather than telling them things - and that Mr. Carbone was supposed to interpret policy (Tr. Oct. 29, page 111, lines 5-24).

The testimony of Mr. Fee on this allegation indicates that at least some of the testimony he gave was based upon information given him by another Regional Manager. It also indicates that at least in some instances Mr. Carbone was interpreting policy to the staff rather than passing information - that it was his responsibility to interpret policy to staff.

IX. AGE DISCRIMINATION AND CONSTRUCTIVE DISCHARGE (RETIREMENT AND REASSIGNMENT)

a. Pre-Myers Regime

Prior to Mr. Myers tenure as Regional Manager of the Boston Regional Office, there were allegations by the Agency, as discussed earlier, of poor performance by the ARMs relative to their inability to establish and to maintain positive working relationships with subordinate staff and management staff at the Boston Regional Office (Agency Exh. 3, part 2, Exh. 21). Mr. Fee, for example, stated that he talked with Mr. Carbone concerning his performance appraisal by Mr. Sorando (who had become Regional Manager of the Boston Regional Office), and that he stated to Mr. Carbone unequivocally that "if I did not see a marked improvement in his ability to work with the Regional Manager, I would transfer him" (Tr. Oct. 30, page 221, lines 1-10). Mr. Fee stated that he made virtually the same statement to the other ARMs but not to the Regional Manager (Tr. Oct. 30, page 222, lines 14-24; page 223, lines 1-16). Both Mr. Sorando and Mr. Lucas presented testimony that conflicted with that of Mr. Fee in this regard.

Mr. Sorando, for example, stated that there was no discussion of transferring Mr. Carbone while he was Regional Manager (Tr. Oct. 29, page 238, lines 9-20). Also, Mr. Sorando stated that at no time was Mr. Carbone's conduct such that Mr. Sorando would recommend him for transfer out of the Boston Regional Office (Tr. Oct. 29, page 181, lines 12-16). Mr. Sorando stated, further, that Mr. Carbone's relationships with the staff were excellent (Tr. Oct. 29, page 174, lines 8-24), that his technical skills and managerial skills were very good (Tr. Oct. 29, page 175, lines 2-24), that he "found Nick to be very cooperative" (Tr. Oct. 29, page 233, lines 21-24; page 234, lines 1-7), and that overall, Mr. Carbone's performance for an ARM was above average and was as good as that of any of the other ARMs (Tr. Oct. 29, page 240, lines 1-17).

Mr. Lucas also presented testimony that did not corroborate the statements of Mr. Fee. For example, Mr. Lucas stated that he did not remember Mr. Fee ever saying that he would transfer Mr. Lucas if the top management team did not cooperate with each other (Tr. Nov. 6, page 157, lines 14-21). Also, Mr. Lucas stated that during his tenure as an ARM, he never had any Regional Manager discuss with him problems

about his performance. He testified that he had received two meritorious service awards, had been nominated by Mr. Layton for a distinguished service award, had been recommended by Mr. Sorando to attend the Executive Institute Program, and had received a special award and \$500 cash for outstanding performance as Acting Regional Manager of the Boston Regional Office (Tr. Nov. 6, page 124). Mr. Lucas stated that at one time Mr. Fee did ask him if he wanted to transfer to the Albany sub-office as the ARM in charge of that office (Tr. Nov. 6, page 157, lines 14-21). Also, Mr. Lucas stated that Mr. Carbone's appraisal was a good, fully successful rating (Tr. Nov. 6, page 210, lines 6-14; page 213, lines 11-24).

b. Mr. Myers' Tenure as Regional Manager

Mr. Carbone contented that the actions which culminated in his charges of constructive discharge and age discrimination began during the tenure of Mr. Myers several months before Mr. Carbone became eligible to retire and continuing subsequent to his attaining retirement eligibility (Tr. Nov. 13, page 14, lines 10-14; page 10, lines 14-20). He alleged that the following actions of Mr. Fee and the Regional Manager, Mr. Myers, support his contentions:

(1)The reorganization of the management staff began in 1983 and he was given no regional manager responsibilities - not even in the audit area.

(2)Beginning in October, 1983, he was placed on a TDY assignment on the PAQRS team for fourteen months against his wishes, and several months prior to his becoming eligible to retire; and that there was no precedent in BRO or in GAO for this kind of treatment of senior management employees.

(3)In January 1985, after he had become eligible for retirement and had completed the PAQRS assignment in December 1984, he was transferred (PCS) to the Office of the Assistant Comptroller General for Operations in Washington on the pretext that he couldn't establish a positive working relationship with staff and management in the Region. The Petitioner alleged that Mr. Myers gave him an alternative - to retire or be transferred (Agency Exh. 3, part 2, Exhs. 20 and 22; Petitioner Exh. 6; Petitioner Exh. 9, Oct. 31, 1985).

Each of these allegations is discussed in turn.

(1) Reorganization of the Boston Regional Office. Mr. Myers testified that the Regions were ordered to pattern their organizations after the Comptroller General's own "BOX" organization, which consisted of the Comptroller General and two Assistant Comptrollers General (an ARM for Planning and Reporting and an ARM for Operations) as policy-makers in the "BOX", and other Assistant Comptrollers General who were not in the "BOX" as policy-makers. Mr. Myers stated that by concept, therefore, the Regions could have two ARMs in the policy-making "BOX", and other ARMs who are not members of the "BOX" (Agency Exh. 3, part 1, TAB-4T, 3rd page; Tr. Nov. 5, page 23, lines 19-24; page 24, lines 1-5). Mr. Fee stated that there are fifteen regional offices - each requiring two ARMs in the "BOX", which equates to a need for 30 ARMs in the "BOX." At the time of the reorganization, Mr. Fee continued, there was a combined total of 47 or 48 ARMs in the regions, so the ARMs not selected for the "BOX" would be doing audit work. He testified further "that if Nick was not in the "BOX", then he would have to be...an audit ARM doing audit work, managing jobs" (Tr. Oct. 30, page 243, lines 17-24; page 244, lines 1-5). Mr. Fee said that he would not permit consideration of Mr. Carbone as one of the ARMs in the "BOX" (Tr. Oct. 30, page 242). Mr. Fee also testified that Mr. Carbone was never an ARM outside the "BOX" because he was selected for the PAQRS assignment instead (Tr. Oct. 30, pages 247 and 248).

Mr. Myers stated that after a meeting with Mr. Carbone and Mr. Lucas in April 1983, he made the decision that Mr. Carbone would not be an acceptable member of his management team (Tr. Nov. 5, page 119, lines 12-17). (Whether this assessment was limited to the BOX, or also, pertained to Audit ARM outside the BOX, was not clear). He testified that one of the factors that impacted on his attempts "to decide whether Mr. Lucas or Mr. Carbone would be offered a position in the "BOX" was the conversation between himself, Mr. Lucas, and Mr. Carbone concerning the "then relatively new Reagan initiatives about Federal employees (that) had to do with the changes of retirement age and the cutting back of...employee benefits as a general thing." Mr. Myers stated that an "early out" of another employee was discussed, and Mr. Lucas expressed interest. He stated that he "asked Mr. Carbone...if he had any interests and he told me 'no', he wanted to work another year, needed some annuity growth, or some such reason" (Tr. Nov. 5, pages 42-42). Mr. Myers stated that after discussing this conversation with Mr. Fee, anticipating a probable early out, Mr. Fee stated that he expected Mr. Myers would need some help and would permit another ARM (Tr. Nov. 5, pages 44-45).

2. PAQRS Assignment. Mr. Myers stated that when he decided that Mr. Carbone would not be in the "BOX", he offered Mr. Carbone assignments in the Boston Regional Office and Mr. Carbone refused them. Mr. Myers testified that when Mr. Carbone did not accept the duties offered Mr. Myers worried because "a senior ARM in my new Region (had) turned down the first assignment I made in my new Region, and that...created in my mind an untenable condition for me to operate." He stated that he considered the refusal insubordination (Tr. Nov. 5, pages 52-58). The assignment offered to Mr. Carbone, Mr. Myers stated, were the Financial Integrity Act; Recruiting Teams to Colleges and Universities, and the Executive Secretariat of the New England International Audit Forum (Tr. Nov. 5, pages 52-55).

Mr. Carbone stated that Mr. Myers did call him in and asked if he would like to take over the Executive Secretariat of the New England Intergovernmental Audit Forum. Mr. Carbone stated that he told Mr. Myers that the task was a part-time job for a GS-13 and that "I didn't think it appropriate to put a GS-15 there full time." He stated that other possible assignments were discussed. Mr. Carbone stated that "up to this point, he had not offered me anything that would involve me in any audit work," and when I asked him why, he responded that I cared too much about people - that he did not want me running jobs (Tr. Nov. 5, pages 275 and 276; Tr. Nov. 5, pages 58, 59; Tr. Nov. 6, page 266-267). Mr. Carbone stated that the dialogue was a discussion as to whether he would be interested in the jobs proposed, and he told Mr. Myers that he was not interested. Mr. Carbone stated that the jobs were never assigned and that he never refused to perform the tasks - he merely stated that he was not interested and that he did not believe the duties to be grade sustaining (Tr. Nov. 6, pages 276-278). He stated that had he been assigned these duties he would have undertaken them as he did with PAQRS where similar statements were made (Tr. Nov. 6, pages 276-279). He stated that he was not insubordinate.

In answer to a question by the Presiding Member as to what he did when Mr. Carbone allegedly refused to accept the assignments, Mr. Myers stated "What I did was in a way get very fortunate or lucky. There was an opportunity, another CG initiative was being staffed at that time...subsequent to the event I described with those other three sets of duties" (Tr. Nov. 5 pages 63, 64, 65). Mr. Myers stated that he was faced with a managerial decision as to whether to discipline or whether to find another solution to the problem (Tr. Nov. 5, page 66); and at that time the request from the Comptroller General for persons to be assigned to the PAQRS project was received. Mr. Myers stated that he nominated Mr. Carbone to the project (Tr. Nov. 5, page 69), and that the nomination prevented his Mr. Myers having to take action against the senior ARM for insubordination. Additionally, he testified, the assignment was a high-level, bonafide assignment with great "visibility, great challenge, great opportunity" (Tr. Nov. 5, page 70).

Mr. Carbone also stated that about a week following the discussion of projects he might do, Mr. Myers asked whether he would like to go on the PAQRS assignment - that he would "get a lot of exposure." Mr. Carbone stated that he responded that "the last thing in the world I need is exposure. I know every single Regional Manager in the GAO personally. I know all the directors personally...I have no desire or ambitions to go anywhere...I am getting at an age where I don't want to be away from my family. I think I have done my share of travel...and I said I really don't want it." Mr. Carbone stated that the next morning Mr. Myers called him in and said to him "You're going on PAQRS...that's right you're going" - to which Mr. Carbone stated that he responded "Fine. What can I say." He (Mr. Carbone) stated that it was a very, very difficult time, and that his wife was in the hospital three times during that period with two major operations - and he was in Washington (Tr Nov. 6, pages 278-280).

The prime consideration in these events pertains to the reason why Mr. Myers placed Mr. Carbone on the 14-month PAQRS assignment. The answer is found in Mr. Myers' testimony and his attempts to find tasks for Mr. Carbone that would not require his involvement in audit functions or with staff in the BRO. His first proposals to Mr. Carbone were not accepted and Mr. Myers stated that he, as an alternative, needed to find another solution to the problem. He stated that he was lucky that PAQRS happened and he assigned Mr. Carbone to it (Tr. Nov. 5, pages 63-64).

Also, the testimony of Mr. Lucas in matters relating to the reorganization as it pertained to him parallel to an appreciable extent the testimony of Mr. Carbone. Mr. Lucas stated that he did not apply for the position of ARM for Operations in the "BOX" because Mr. Myers told him that he did not want him. Additionally, Mr. Lucas testified that it was his impression from Mr. Fee, and he was also told, that ARMs not selected for the two "BOX" positions would become ARMs for audit (Tr. Nov. 6, page 171, lines 15-20; page 172, lines 3-24; page 173, lines 4-7). Mr. Lucas also stated that on February 15, 1984, Mr. Myers told him (as Mr. Carbone testified that he was told) that there would be only two ARMs in the BRO. Mr. Lucas stated that "I think he told me that because he was urging me to leave the Region. I think he was urging me to leave the Region because we talked about an early retirement some time before. Also, he offered me an assignment under the Intergovernmental Personnel Act over at Suffolk University; and he asked me if I wanted to transfer to Washington. I am not sure of the reason why he wanted me to leave the Region. He also said that I would not be the Regional Manager for Audit - that was too big a chunk of the Region."

Additionally, Mr. Lucas stated that what Mr. Myers wanted him to do was to accept project assignments with no staff (Tr. Nov. 6, page 175, lines 4-24; page 176, lines 1-18).

An analysis of the testimonies of Mr. Fee, Mr. Myers, Mr. Carbone and Mr. Lucas indicates a definite lack of corroborative support in the statements of Mr. Fee and Mr. Myers as to (1) the roles of Mr. Carbone and Mr. Lucas under the reorganization and (2) the reason why Mr. Carbone was not given an audit ARM position in the BRO. For example, Mr. Fee testified that ARMs not selected for positions in the "BOX" would be assigned positions as Audit ARMs. Both Mr. Carbone's and Mr. Lucas' testimonies corroborated this statement. Yet, when the reorganization went into effect, both ARMs testified that they were not selected as "BOX" ARMs and Mr. Myers would not assign them to audit work because he did not want them working with staff. Also, both ARMs testified that Mr. Myers offered them special project assignments full time - some of which, as testified to at that time, were part-time assignments for grades GS-13s and GS-14s. Mr. Fee, by contrast, stated that Mr. Carbone was not offered an Audit ARM because of his assignment to PAQRS and Mr. Myers, in another statement, said that Mr. Carbone was assigned to PAQRS because in essence, his refusal to accept the special projects proposals was an act of insubordination and created an "untenable operating position" for Mr. Myers. He stated that he was

"fortunate" or "lucky" that the PAQRS assignment happened at that time, allowing him to nominate Mr. Carbone. The record, however, does not indicate that Mr. Carbone was officially assigned these duties, directed to perform them, and refused to do so. Considering the comparable incident with the PAQRS assignment, and Mr. Carbone's acceptance, without question of a 14-month assignment he did not want, but was directed to take, Mr. Carbone's testimony that the charge of insubordination is unjustifiable is more credible than that of Mr. Myers' charges.

Additionally, the Agency presented no evidence to refute the testimony by Mr. Lucas that the nature of the conversations and actions taken by Mr. Myers when discussing Mr. Lucas' future role in the Region indicated to him that Mr. Myers was trying to get him to leave the Region - either by early retirement or transfer. As reflected in the record, similar actions and statements were made to and about Mr. Carbone - culminating in his assignment to the PAQRS project, which literally kept him on TDY and out of the Boston Regional Office for approximately 14 months. In addition to the conditions discussed, Mr. Myers, during the period of June to October 1983 reorganized the BRO and promoted two employees to the grade of GS-15 and assigned them to positions in the "BOX." Mr. Goldstein, a 37-year old employee, became the ARM for Operations on June 10, 1983, and Mr. Croke became the ARM for Planning in October 1983. On or about July 6, 1983, Mr. Carbone was nominated to the PAQRS team, effective October 1, 1983.

3. Reassignment to Washington, Permanent Change of Station.

a. Meeting with Mr. Schwandt and Mr. Myers. Mr. Carbone stated that on April 13, 1984, at his request, Mr. Schwandt talked with him about his BRO duties when he came back to the Region (Tr. Nov. 6, page 282, lines 5-24). Mr. Carbone stated that Mr. Schwandt said something to the effect that "Mort thinks you are going to retire," and Carbone said that he responded "No, I never told Mort I was going to retire and I don't think it is an appropriate time to bring it up" (Tr. Nov. 6, page 283). Mr. Schwandt then arranged the meeting with Mr. Myers.

Mr. Myers stated that on April 13, 1984, during his discussion with Mr. Schwandt, Mr. Schwandt advised him that Mr. Fee was interested in having Mr. Carbone assigned to his office in Washington to institutionalize PAQRS (Tr. Nov. 5, page 79). Mr. Schwandt stated that Mr. Carbone was returning to the Boston Regional Office from his (PAQRS) assignment in Washington and he needed to be integrated back into the office (Tr. Nov. 6, page 30, lines 5-16). Mr. Schwandt stated that at the meeting, as he recalls, Mr. Myers "was concerned about the upcoming rotation of Nick (coming back to Region after PAQRS), what his (Carbone's) plans were for the future, and what kind of opportunities that would mean for him as far as his coming back into the Region, or whatever his activities were going to be" (Tr. Nov. 6, page 30; page 31, lines 1-9). Mr. Schwandt also stated that Mr. Carbone's transfer "was discussed in terms of not a specific transfer. It was discussed in terms of what he's going to be doing next. There was an indication that Mort had some prior knowledge that Nick had wanted to possibly retire, and if I remember right, Mort asked him about that. If he wasn't going to do it, what that would key in this, he would have to make some other decisions about what assignment, anything (he) would be doing upon his return, or other opportunities within the Agency..." (Tr. Nov. 6, page 31, lines 20-24; page 32, lines 1-12). These remarks by Mr. Schwandt suggest that in so far as Mr. Myers, was concerned, retirement was a consideration that figured in future assignments for Mr. Carbone. The record does not contain a statement to the effect that Mr. Carbone had initiated a discussion of his retirement.

Mr. Carbone stated that at the meeting between him, Mr. Myers, and Mr. Schwandt, the first thing Mr. Myers said to him (Mr. Carbone) was "I thought you were going to retire at the end - after working an additional year. You told me that at one point." Mr. Carbone said that he responded, "No, I never said that, Mort..." At that point, Mr. Myers is alleged to have said, "In that case, Frank Fee wants you in Washington to help institutionalize PAQRS...you're being transferred to Washington. Mr. Fee wants to talk to you about it." Mr. Carbone stated that at that time, Mr. Myers gave him the time and the date to talk with Mr. Fee about the transfer to Washington. He said that he believes the date was April 23, and the time was 9:30 a.m., but he was not quite sure (Tr. Nov. 6, page 284, lines 1-20).

Mr. Schwandt, while admitting that Mr. Carbone's transfer was discussed, stated that, in his view, it would not be accurate to say that Mr. Myers presented Mr. Carbone with an ultimatum to retire or be transferred, and that he did not "assess any threats or deals in any way" (Tr. Nov. 6, page 32, lines 13-24; page 33, line 1). Mr. Schwandt did testify, however, that in April 1984, he did not go to Boston with a message for Mr. Myers concerning Mr. Carbone's transfer to Washington - and that he had no idea on that date that Mr. Carbone was being transferred to Washington. "We knew that you (Mr. Carbone) were terminating your assignment with PAQRS (Mr. Schwandt continued) and that's about all" (Tr. Nov. 6, page 39, lines 14-24; page 40, lines 1-8). To whom the term "we" referred was not given. This statement by Mr. Schwandt (that he did not take a message to Boston concerning Mr. Carbone's transfer and had no idea on that date that Mr. Carbone was being transferred) is a direct contradiction to the testimony of Mr. Myers. Mr. Fee corroborated Mr. Schwandt's testimony by testifying that on or about April 1984 he did not tell either Mr. Schwandt or Mr. Myers that Mr. Carbone was being transferred to Washington (Tr. Oct. 30, page 299, lines 6-9). However, Mr. Fee did testify that he believed that around April 23, 1984, he met with Mr. Carbone in his (Mr. Fee's) office for the purpose of telling Mr. Carbone that he was being transferred (Tr. Oct. 31, page 299, lines 10-20); then Mr. Fee stated that he did not recall the April date (Tr. Oct. 31, page 300, lines 5-14). Mr. Peterson, Mr. Fee's Assistant, stated that he believes that the initial meeting between Mr. Carbone and Mr. Fee regarding his transfer to Washington was April 1984. The testimony given by Mr. Fee, as does that of Mr. Schwandt, conflicts with that of Mr. Myers; conversely, however, Mr. Fee's testimony is contradictory within itself. It generates a question as to how the estimated meeting date of April 23, 1984 with Mr. Carbone to discuss the matter of the transfer parallels the date given by Mr. Carbone and the timeframe of the testimony of Mr. Myers as to the meeting with Mr. Fee, if there had been no previous communication on the matter between Mr. Fee, Mr. Schwandt, and Mr. Myers or Mr. Fee and Mr. Myers.

Mr. Myers stated that he never told Mr. Carbone that there would be only two ARMs in the Boston Regional Office, or that he had a choice of either retiring or being transferred (Tr. Nov. 5, pages 77-79; 82-85). He stated that in conjunction with Mr. Fee's interest in having Mr. Carbone transferred to Washington, he did, in April 1984, ask Mr. Carbone whether he planned to retire (Tr. Nov. 5, page 163, lines 10-21). He stated that he asked the question because the previous year, during his discussion with Mr. Carbone about retirement, Mr. Carbone had stated that he planned to work a year to build up his annuity; so he knew it would be a bad management move for Mr. Fee to take on someone who would be leaving. Too, Mr. Myers stated that it was April and he had to perform his own Needs Assessment. He stated that Mr. Carbone became upset with him for even asking (Tr. Nov. 5, page 78, lines 11-24; page 79; page 81, lines 1-16). One of the questions generated by this testimony is this: If Mr. Fee had already made the decision to transfer Mr. Carbone, why was Mr. Myers continuing to ask questions about Mr. Carbone's retirement plans? The record does not provide an answer and causes additional doubt as to the credibility of the statements of Mr. Myers, Mr. Fee, and Mr. Schwandt.

Mr. Lucas presented testimony that corroborated to some degree Mr. Carbone's allegation that Mr. Myers had given Mr. Carbone a choice of either retiring or being transferred. Mr. Lucas testified that his office was next to Mr. Myers'; and in May 1984 (he stated he believes this was the date) Mr. Myers came into Mr. Lucas' office and told him that Mr. Fee wanted to transfer Mr. Carbone "to Washington in a position, a valid GS-15 position, which had to do with continuation of the work that Mr. Carbone) had been working on in PAQRS - and that if (Carbone) did not choose to transfer, he always had the option to retire" (Tr. Nov. 6, page 170, lines 4-21). Additionally, Mr. Lucas stated that he was responsible for preparing the 1984 Needs Assessment, that he did not discuss it with Mr. Fee, and that there was nothing in the Assessment concerning the retirement of a GS-15 (Tr. Nov. 6, page 162, lines 21-24; page 163, lines 1-7) as indicated by Mr. Myers, who had stated in the 2Y 1985 Needs Assessment that the expected retirement of a GS-15 reflected in the 1984 Needs Assessment (Tr. Nov. 5) had not materialized (Petitioner's Exh. 8). The record does indicate, however, that the Needs Determination for 2Y 1985, prepared May 14, 1984 by Mr. Myers, does state that in 2Y, 1985, the Boston Regional Office will lose two GS-15's from BRO (Petitioner Exhibit 8). The statement is a positive one (will lose), and supports an inference that as early as May, 1984, while Mr. Carbone was still on the PAQRS assignment, Mr. Myers anticipated the retirement or the transfer of both Mr. Lucas and Mr. Carbone.

As discussed, conflicting statements by Agency witnesses Mr. Myers, Mr. Schwandt, and Mr. Fee concerning the reason why Mr. Carbone was transferred, and both how and when the transfer decision was made known-reduce the acceptability of the testimony offered by them and enhance the credibility of the statements of the Petitioner and his witnesses. A brief summary of some of these conflicting statements follows:

1. Mr. Myer's statement that on April 13, 1984, Mr. Schwandt had advised him of Mr. Fee's interest in having Mr. Carbone transferred to Washington to institutionalize PAQRS.
2. Mr. Schwandt's statement that in April, 1984, he did not go to Boston with a message from Mr. Fee to Mr. Myers concerning Mr. Carbone's transfer, and that he had no idea on that date that Mr. Carbone was being transferred to Washington.
3. Mr. Fee's statement that in April, 1984 he did not tell either Mr. Schwandt or Mr. Myers that Mr. Carbone was being transferred to Washington.
4. Mr. Carbone's statement that the April 13, 1984 meeting, Mr. Myers told him that since he was not retiring Mr. Fee was transferring him to Washington, and on that date, gave him a date of around April 23 to go to Washington to discuss the matter with Mr. Fee. Though Mr. Fee stated that he had not discussed the transfer with either Mr. Schwandt or Mr. Myers in April 1984, Mr. Fee met with Mr. Carbone on April 23, 1984 to discuss the transfer as Mr. Myer said he would. Mr. Peterson, Mr. Fee's assistant, corroborated the testimonies of Mr. Myers and Mr. Carbone in this regard by testifying that the initial meeting between Mr. Carbone and Mr. Fee regarding Mr. Carbone's transfer to Washington was in April 1984.
5. Mr. Myers stated that he asked Mr. Carbone about his retirement plans at the 13 April meeting to inform Mr. Fee in conjunction with Mr. Fee's plans to transfer Mr. Carbone. The previous year, Mr. Myers stated, Mr. Carbone had stated that he planned to work a year to build up his annuity. Mr. Fee, by contrast, has stated that in April he had not discussed plans to transfer Mr. Carbone with either Mr. Schwandt or Mr. Myers. Why then, would Mr. Myers be asking Mr. Carbone of his retirement plans?

6. Mr. Myers stated that he had not given Mr. Carbone a choice of either retiring or being transferred as Mr. Carbone alleged. Mr. Lucas, however, testified that in May, 1984, Mr. Myers (whose office was next to Mr. Lucas' at that time) came into Mr. Lucas's office and told him that Mr. Fee wanted to transfer Mr. Carbone to Washington in a position, a valid GS-15 position... and that if Mr. Carbone did not choose to transfer, he always had the option to retire. The record does not depict this statement as a quote by Mr. Fee, but as a statement of the options of Mr. Carbone as viewed by Mr. Myers.

7. Mr. Myers in justification for his discussion of retirement, stated that the Needs Assessment for Fiscal Year 1985 (Petitioner Exh. 8), and beginning Oct. 1984, contains a statement that the projected retirement of one GS-15, projected in the Needs Assessment for Fiscal Year 1984 had not occurred. He stated that the FY 1984 Needs Assessment was prepared by himself and Mr. Lucas (Tr. Nov. 5, pages 152,153). Mr. Lucas, by contrast, stated that he was responsible for preparing the 1984 Needs Assessment and there was nothing in the Assessment concerning the retirement of a GS-15. In his 2Y 1985 Needs Assessment, however, Mr. Myers states without reservation that BRO will lose two GS-15s in 2Y 1985-inferring that for one reason or another, neither Mr. Carbone nor Mr. Lucas would be employed in the BRO throughout the year (Petitioner Exhibit 8, Section III, page 9).

8. Also, Petitioner's Exhibit No. 8, the 1985 Needs Assessment, dated May 14, 1984, states that during Fiscal Year 1985, it is anticipated that two GS-15s will be lost from BRO. "Mr. Myers testified in response to a question in cross-examination that one of the GS-15s is probably in reference to Mr. Lucas' early out, (which never materialized and the other is probably an eventual transfer of you (Mr. Carbone) or your retirement because at lunch you had told me you wanted to work another year to improve your annuity, so those are possibilities" (Tr. Nov. 5, page 158, lines 4-13). During the cross examination, Mr. Carbone stated by reference that the lunch period to which Mr. Myers referred was during the period of the Needs Assessment for FY 1984, prepared in April 1983 (Tr. Nov. 5, page 158, lines 14-15. Mr. Myers also stated that while he did not know in April 1984 that Mr. Fee was actually going to transfer Mr. Carbone, he (Mr. Myers) was not speculating - that he knew that Mr. Fee was calling Mr. Carbone in for that purpose (Tr. Nov. 5, page 158, lines 17-24; page 159, lines 1-24). The perplexing question arising from Mr. Myers' testimony is that if Mr. Carbone had expressed no intention to retire (and the record does not reflect his intention to do so) why did Mr Myers project his anticipated transfer or retirement? Also, his statements in regard to this matter are conflicting in that he states on the one hand that he did not know in April, 1984 that Mr. Fee was actually going to transfer Mr. Carbone; but, conversely, stated by reference that he was not speculating and that he knew that Mr. Fee was calling Mr. Carbone in for that purpose (to transfer him). The issue becomes even more incongruous when consideration is given to the fact that Mr. Carbone was still assigned to the PAQRS project and would not be finished until December 1984. Mr. Myers' testimony adds to the credibility of Mr. Carbone's assertion that Mr. Myers indicated that he (Mr. Carbone) had a choice to retire or be reassigned.

The conflicts and contradictions discussed in this section, as reflected in the record, bring into serious questions the contentions of the Agency that Mr. Carbone's age and retirement eligibility were not "determining factors" in the transfer action that culminated in his charge of constructive discharge.

X. CONCLUSION AND DECISION

On January 14 and 31, 1985, Mr. Fee informed Mr. Carbone that he was directing Mr. Carbone's reassignment from the position of Supervisory GAO Evaluator GS-347-15, the Boston Regional Office to the position of Management Analyst, GS-343-15, in the Washington, D.C. Office of the Comptroller

General. The reassignment, the letter stated, resulted in Mr. Carbone's having to make a permanent change-of-station move (Agency Exhibit 3, Part 2, 21-A and 21) The following reasons were offered by the Agency for the reassignment action:

1. The projected workload and needs of both the Boston Regional Office and the Office of the Comptroller General and Mr. Fee's judgment that Mr. Carbone "will be able to contribute most to the mission of the General Accounting Office working for me (Mr Fee) in Washington, DC (Agency Exhibit 3, Part 2, 21-A).
2. The (alleged) difficulties the Agency has had over the years with Mr. Carbone's ability to establish and to maintain positive work relationships with both the management team and staff in the Boston Regional Office (Agency Exhibit 3, Part 2, 21).

Mr. Carbone responded to the Agency allegations by stating that "there is no performance-based reason for his reassignment to Washington (and that) he believes the reassignment is a form of pressure to force him to retire and, as such, constitutes age discrimination" (Agency Eh. 3, Part 2, Exh. 20). Mr. Carbone contended that he performed well in Boston, had the respect of the staff, and exhibited an unquestioned technical ability (Tr. Nov. 13, page 14, lines 16-21).

a. Performance and Staff Relationships

The Agency stated that it was not its intent "to prove that Mr. Carbone was responsible for any quantifiable part of the Boston Regional Office management problems. It's our intent the Agency stated, to prove that Mr. Carbone, as an ARM, owned a share of the problems in Boston" (Oct. 29, page 202, lines 22-24, page 203, line 1-5). The Agency refers to the results of a study of the Boston Regional Office that concluded that the ARMs are the cause of the management problems in the Boston Regional Office to support its contentions against Mr. Carbone and the other ARMs. Also, in support of his intent of proof, Mr. Fee stated that the efforts to organize the BRO to get more team work in the management structure was successful in determining what each of the parties of the management team needed to do to be a cohesive management team, but was not successful in accomplishing it because, "in my way of thinking...the ARMs did not want to make it happen" (Tr. Oct 30, page 202, lines 7-24). Mr. Fee noted for the record that the first Regional Manager under whom problems surfaced, Mr. Layton, was reassigned, and Mr. Sorando was appointed Regional manager of BRO. Mr Sorando, Mr. Fee testified, was the second regional manager, and he (Mr Fee) still had the same problems; so, Mr. Fee stated, in his (Fee's) judgment, the Regional Manager was not the problem, the ARMs were (Tr. Oct. 30, page 223, lines 1-24; page 226, lines 18-21). These statements, as well as others in the record, identify the alleged problems in the region as being performance-oriented and reflect to a considerable degree the Agency's contention that the ARMs as a group, which included Mr. Carbone, failed to support the initiatives of the Regional Manager and to establish the positive staff relationships necessary to accomplish required management team objectives.

Section 5 HSC 4302 of Public Law 95-455, October 13, 1978, Paragraph 4302, Establishment of Performance Appraisal System, states that "each Agency shall develop one or more performance appraisal systems which... (3) use the results of performance appraisals as a basis for...reassigning ...employees. Paragraph (b) states that under regulations which the Office of Personnel Management shall prescribe, each performance appraisal system shall provide for (1) establishing performance standards which, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria...related to the job in question for each employee or position under the system..., (3) evaluating

each employee during the appraisal period on such standards...(and) (6) reassigning, reducing in grade, or removing employees who continue to have unacceptable performance, but only after an opportunity to demonstrate successful performance." (Underlining for emphasis).

This regulation clearly requires that the performance of each employee be evaluated during an appraisal period on the basis of objective criteria and standards. It indicates that there must be a performance appraisal for each employee, and the evaluation received, based upon a continuous unacceptable performance rating, will be the basis for reassigning, reducing in grade, or removing an employee, but only after an opportunity period if there is unacceptable performance. Mr. Carbone's performance, therefore, is required to be evaluated separately from that of the other ARMs of the BRO, rather than as part of a group evaluation, as stated by the Agency; and the rating received by him as an employee, separate and apart from others, should be the basis of a reassignment action based on his unacceptable performance. (Underlining for emphasis).

Section 38 HSC 4101 et seq. (3) states that "unacceptable performance" means performance of an employee which fails to meet established performance standards in one or more critical elements of an employee's position. Section 430.203 of 5 CFR, Title 5, Part 430, Performance Appraisal, defines the appraisal period as that period of time established by an appraisal system for which the employee's performance will be received and for which a performance rating will be given.

The Agency, by the statements of Mr. Fee that its primary and on-going reason for the reassignment of Mr. Carbone to Washington was due to the alleged difficulties over the years with his ability to establish and to maintain positive work relationships with both the management team and the staff in the Boston Regional Office, attributes its action to unacceptable performance in one or more critical elements of the job by the petitioner. The record, however, as reviewed in the Discussion and Analysis section of this Decision, does not support the Agency's conclusion that the Petitioner performed at an unacceptable level. Testimony on the performance issue was presented by many witnesses, but the issue of unacceptable performance turns largely on the credibility of the testimonies of subordinate staff members; Mr. Fee, Mr. Peterson; former Regional Managers, Mr. Layton, Mr. Sorando, and Mr. Lucas; the Petitioner, Mr. Carbone; and the present Regional Manager Mr. Myers. Examples of these credibility determinations as have already been discussed, are as follows:

The Agency contended that Mr. Carbone was unable to establish and to maintain positive work relationships with subordinate staff because of problems in work assignments, staffing, promotion, and travel; that these problems were due to staff perceptions of three mini-regions within the BRO - each operating under a separate ARM who established policies for these areas of work; and that Mr. Carbone had major responsibilities for these perceptions (Tr. Oct. 28, page 83; page 84; pages 56-57; Oct. 29, page 10; Oct. 30, pages 229-230; Nov. 13, page 24). The record, however, indicates that the testimony presented by subordinate staff is for the most part, exactly opposite that indicated by the Agency. Subordinate staff, for example, evaluated Mr. Carbone as one of the best qualified individuals who as a manager "gave us (the staff) tremendous opportunity;" "he had the ability to interact with BRO staff and Washington" (Tr. Oct. 28, pages 53-54). One witness stated that in a conversation he had with Mr. Layton (who was the Regional Manager at that time) about the three ARMs, Mr. Layton stated that "if you walk through the regional office, you can tell who is working for each ARM... Foley's people look scared shitless, Lucas' people got their heads down like they are afraid to look up, and Carbone's people seem rather relaxed and kind of carefree and doing their jobs" (Tr. Oct. 28, page 244, lines 17-24; page 245, lines 1-5). Additionally, Mr. Carbone was recommended for an award by approximately thirty-three

members of the subordinate staff, a fact which does not reflect an inability to get along with subordinate staff (Tr. Oct. 29, page 8, lines 6-9). The testimonies of subordinate staff do not support the contentions of the Agency in this regard.

Each of the individuals who currently serve, or at one time, served as Regional manager of the Boston Regional Office, also testified that Mr. Carbone got along well with staff. For example: Mr. Sorando stated that Mr. Carbone's relationships with staff, by and large, "were excellent" (Tr. Oct. 29, pages 174, lines 8-24; page 175, line 1). Mr. Layton stated that Mr. Carbone was very friendly with staff and well liked by staff (Tr. Oct. 29, page 8, lines 6-9); Nov. 5, page 50, lines 9-24; page 51, lines 1-3) and that he did not want Mr. Carbone working with staff because he cared too much for staff (Tr. Nov. 5, page 58, lines 3-24) - a statement that does not imply that Mr. Carbone could not get along with staff. Mr. Lucas stated that "he was satisfied with Mr. Carbone's staff relations (Petitioner Exhibit 9). These comments by subordinate and management staff do not support the Agency's contentions that Mr. Carbone could not establish and maintain positive work relationship with staff of the Boston Regional Office, but do support Mr. Carbone's contentions that he performed in a fully acceptable manner.

(2) The Agency also contended that the ARMs developed their own mini-regions within the Boston Region Office and that each ARM controlled work assignments, promotions, travel, and both secretarial and administrative matters for his operations (Tr. Oct. 30, page 22; page 23, lines 1-8; Tr. Nov. 5, page 230, lines 17-24; page 231 lines 1-12; Tr. Oct. 30, page 339, lines 3-16). Mr. Lucas, however, who was both an ARM and an Acting Regional Manager at various times, testified that the possible perception of three mini-regions within the office was probably due to the fact that each ARM was assigned, by the Regional Manager, a specific area of work for which he was responsible. He stated, however, that ARMs never set policy for travel, promotion, staffing, etc. (as allegedly was perceived by the Staff). He stated that these policies were set by the Regional Manager, were consistent throughout the Regional Office (Tr. Nov. 6, page 141, lines 22-24; page 142, page 143, lines 1-3), and that the same procedure was followed by each Regional Manager (Tr. Nov. 6, pages 142-143). Mr. Sorando, another former Regional Manager, stated that "the role that an Assistant Regional Manager pursued was by and large dictated by the Regional Manager..." (Tr. Oct. 29, page 174, lines 1-7).

Mr. Sorando also stated that he instituted changes that downplayed the role of the ARMs, but at no time did the ARMs rebel or become insubordinate (Agency Exhibit 3, 4-H). The evidence indicates that the perception of three mini-regions within the Boston Regional Office was the result of the organizational structure of the Boston Regional Office, which was dictated by the Regional manager (and not the ARMs) - as were the policies relative to staffing, assignment, promotions, travel, and etc. Reasons to the contrary proffered by the Agency, based upon the evidence presented for the record were less credible than those offered by subordinate staff and ex-Regional Managers. The Petitioner carried his burden of persuasion relative to this issue.

3. The Agency also contended that an atmosphere of fear, intimidation, and suspicion was prevalent in the workplace (BRO) and that Mr. Carbone had major responsibilities for these conditions (Tr. Oct 31, page 167, lines 19-22). The subordinate staff did not support this allegation of the Agency (Tr. Nov. 6, page 74, lines 5-20; Tr. Oct. 28, page 34, lines 15-21; page 143, lines 1-14; pages 110-111; pages 135-136; pages 140-142; page 177, line 1; page 222). During this period, also Mr. Carbone was recommended by 33 staff members for an award "in recognition of the positive impact you (he) have had on improving staff relations and the work environment within the regional office, as well as the significant contributions you have made to the professional growth and quality of the BRO staff." Mr. Sorando attributed these

conditions of fear, reprisal, intimidation, etc. primarily to one of the other ARMs (Agency Exh. 3, Part 2, Exh 8), and Mr. Carbone was assessed as being very cooperative (Agency Exh 3, Part 1, Exh 1D) Again the Petitioner carried his burden of persuasion that contrary to the allegation of the Agency, he got along well with the Staff of BRO.

(4) Mr. Fee and Mr. Myers cited the performance appraisals of Mr. Sorando and Mr. Lucas as evidence of Mr. Carbone's inability to get along with the staff. While all testimony regarding the performance of Mr. Carbone is essential, the credibility of the Agency's allegations of poor performance turns to a considerable degree upon the testimonies and the rebuttal statements regarding these two appraisals. Mr. Peterson, Mr. Fee's assistant stated that in a meeting of October 18, 1984 in which the reassignment of Mr. Carbone was discussed by Mr. Fee, the bulk of the discussion did center around problems and a rating that Mr. Sorando had prepared on Mr. Carbone (Tr. Oct. 31, page 27). These problems included, Mr. Fee stated, an inability of the ARMs to work together as a team; their non support of management initiatives; and management in general (Tr. Oct. 30, page 213, lines 4-24). Here, again, is another indication that the performance of the ARMs was being viewed by Mr. Fee as a group rather than as individuals. Statements of Mr. Myers supported Mr. Fee's testimony by referring to Items 2,6, and 8 of Mr. Sorando's performance appraisal of Mr. Carbone as evidence of Mr. Carbone's problems in establishing effective staff relationships (Tr. Oct 31, pages 181-183). Item 2 pertains to Cooperation; Item 6, to Oral Communication; and Item 8 to Establishing and Maintaining Effective Working Relationships.

Mr. Sorando categorically disagreed with both Mr. Fee's and Mr. Myer's interpretation of his (Mr. Sorando's) performance appraisal of Mr. Carbone. For example: Mr. Sorando, in contrast to Mr. Fee's testimony, stated that (1) he never complained to Mr. Fee about Mr. Carbone or any of the other ARMs (Tr. Oct. 29, page 184, lines 1-24); (2) Mr. Carbone's relationship with staff was excellent, and his managerial capabilities were very good (Tr. Oct. 29, pages 174-178; page 182; page 184); (3) at no time was Mr. Carbone's conduct such that he would recommend him for transfer out of the Boston Regional Office (Tr. Oct. 29, page 181, lines 12-16); and (4) there was no talk of transferring Mr. Carbone while Sorando was Regional Manager (Tr. Oct. 29, page 238, lines 19-20). The most critical testimony however, concerning the issue of Mr. Carbone's performance dealt with the performance appraisal itself. Mr. Sorando stated that while there were a couple of areas in which there were problems that he felt should be brought to Mr. Carbone's attention for remedial action (Tr. Oct. 29, page 181, lines 5-11), in several areas the performance appraisal was quite laudatory (Tr. Oct 29, page 181, lines 1-16); and that "overall, Carbone's performance as an ARM was above average and was as good as that of any of the other ARMs. (Agency Exh. 3, Part 2, Exh 8, par. 85); (Tr. Oct. 29, pages 174-176; Agency Exhibit 3, Part 1, Exh. D).

Mr. Lucas, in commenting upon Mr. Myer's and Mr. Fee's interpretations of Mr. Lucas' performance appraisal of Mr. Carbone, stated that he gave Mr. Carbone a "fully successful" rating, but added what he considered to be an appropriate critique to bring about corrective action (Tr. Nov. 6, page 213, lines 11-24; Agency Exhibit 3, Part 2, Exh. 7, (Affidavit of Louis Lucas). Mr. Lucas also stated that he had no problems in his dealing with Mr. Carbone, and never complained to Mr. Fee about Mr. Carbone's performance (Tr. Nov. 6, page 125, lines 5-10); that Mr. Carbone got along well with staff, is a well respected person, and is a good person (Agency Eh. 3, part 2, Exh 7, Affidavit of Louis Lucas). Mr. Lucas also noted that his statement on Mr. Carbone's performance appraisal to the effect that Mr. Carbone could "help the Region maintain a more positive and effective work environment... was made in the context of counseling Mr. Carbone to exercise more caution so as to avoid criticizing one person in front of another. In that context (he stated) not...(improving) the work environment in a general sense "(Tr. Nov. 6, page 214, lines 21-24; page 215; page 216, lines 1-5.

The record does not substantiate the Agency's contention that the performance ratings of Mr. Carbone given by Mr. Sorando and M. Lucas are sufficient reasons for the reassignment of Mr. Carbone and the arrival at a conclusion that he could not establish and maintain positive work relationships with the staff of the Boston Regional Office. On the contrary, based on the record, the opposite is true. While some of the other ARMs may have had chronic problems relative to maintaining positive staff relationships, neither the performance appraisals of Mr. Sorando and Mr. Lucas nor the testimonies and comments of Mr. Sorando, Mr. Lucas, and members of subordinate staff support the contentions of the Agency in this regard relative to Mr. Carbone. Mr. Carbone's performance on the two performance appraisals to which the Agency referred as reasons for his reassignment was "above average" for one and "fully successful" for the other. Here again, the Petitioner carried his burden of persuasion with regard to his claim that the Agency's performance-based allegations as a reason for his reassignment are pretextual.

Par. 430.204 of 5 CFR, Title 5, Part 430, performance Appraisals, Par. (d)(2) states that "if an employee is rated "unacceptable" in one or more critical elements (during a performance period), an "Unacceptable" summary rating must be given." (Underlining for emphasis) Par. 430.204 (h) (3) of the same statute defines the term "fully acceptable" as "performance which is of good quality. The employee produces the expected quantity of work and meets deadlines or schedules for completion of work." The Petitioner received at least a "fully successful" summary performance rating from both Mr. Sorando and Mr. Lucas. No element, according to the record, received an unacceptable rating; however, both performance appraisals contained information as to how performance may be improved. Par. 430.204 (S) of 5 CFR, Title 5, Part 430, Performance Appraisals states that "performance appraisals shall be used to provide employees with information on their performance and how it may be improved."

Mr. Sorando and Mr. Lucas complied with this requirement. The ratings they gave the Petitioner, however, were "above average" and "fully successful." In all performance based areas, the Petitioner met his burden of persuasion by showing that the Agency allegations relative to his inability to maintain positive work relationships with staff and Regional Managers were pretextual and not supported by the record as a whole.

b. CONSTRUCTIVE DISCHARGE AND AGE DISCRIMINATION

(1) Reorganization of the Boston Regional Office

By the time Mr. Myers became Regional Manager of the Boston Regional Office, the Comptroller General of the GAO had instituted a new organizational concept in his Headquarters office and required each of the Regional Offices and each of the division in Washington "to mirror the organizational set up of the Office of the Comptroller General" (Tr. Oct. 30, page 239, lines 8-22). The Boston Regional Office was reorganized to comply with the requirements of the GAO Comptroller General. Factors associated with this reorganization, as they apply to this case are as follows:

(2) Agency Contentions. On January 31, 1985, the Agency informed Mr. Carbone that his reassignment from the Boston Regional Office to Washington would become effective on March 18, 1985 (Agency Exhibit 3, Part 2, Exh. 21. 21-A). The Agency stated that the reasons for this reassignment was the "difficulties we have had over the years with your ability to establish and to maintain positive work relationships with both the management team and (the) staff in the BRO" (Agency Exh. 3, Part 2, Exhs. 20, 21). Additionally, the Agency stated that Mr. Carbone's successful performance on PAQRS "demonstrates that (his) permanent reassignment from the Boston Regional Office to Washington will contribute significantly to the efficiency of GAO" (Agency Exhibit 3, Part 2, Exhibit 21-C).

(3) Petitioner's Contentions. The Petitioner contended that the Agency, under the pretext of (1) Mr. Carbone's inability to establish and to maintain positive work relationships with the staff and management and (2) there being a valid need for his talents in Washington, effected his reassignment. He contends that he was constructively discharged and discriminated against because the reassignment and the 14-month TDY actions occurred immediately prior to, and beginning with his becoming eligible to retire (Tr. Nov 13, page 10, lines 14-20); that there was no performance-based reason for his reassignment to Washington as alleged by the Agency; and that the reassignment was a form of pressure to force him to retire and, as such, constituted age discrimination (Agency Exhibit 3, part 2, Exh. 20; Petitioner Exhibit 6). Also, Mr. Carbone asserted that from July, 1983, until his PAQRS assignment three months later, Mr. Myers, in fact, gave him a de-facto demotion (Petitioner Exhibit 9, Oct. 31, 1985). The Agency, in response to Mr. Carbone's contentions, stated that even if Mr. Carbone had been 30 years old and had not been eligible to retire, he would not have been permitted to remain in Boston once Mr. Myers became the Regional Manager there (Tr. Nov. 13, page 26, lines 9-15).

c. Legal Analysis - Age Discrimination. Most courts have held that proving a case of age discrimination in employment is governed by the same analysis as that followed under McDonnell Douglas Corp. V. Green, 411 U.S. 792 (1973). The prima facie case of age discrimination is established by the petitioner by showing that:

- (1) The Petitioner was in the protected age group;
- (2) The Petitioner was qualified for the position;
- (3) The Petitioner was adversely affected by an employment decision or practice of the employer; and
- (4) The employer sought or hired for the position a person under forty years of age with the same or similar qualifications as those of the Petitioner. Additionally, the Petitioner is required to present some evidence which creates an inference of discrimination. Some proof of a relationship between age and the adverse action is necessary. Toussaint v. Ford Motor Co., 581 F.2d 812, 815 (10th Cir. 1978). Laugesen v. Anaconda Co., 510 F. 2d 307, 311-313 (6th Cir. 1975).

As presented in the discussion of the prima-facie case in this Decision, the Petitioner met this burden of proof by showing that he was 58 years of age at the time of the reassignment action - well within the scope of the ADEA protected age group of forty to seventy-years of age; that he was qualified for the position in that he was an ARM for fifteen years in the Boston Regional Office and had received "above average" and "fully successful" ratings on his last two performance ratings; that he was adversely affected by the Agency's decision to reassign him in that he was in fact (1) demoted from a Supervisory Evaluator Position (ARM), GS-15 in the Boston Regional Office, to a position of Management Analyst GS-15 in Washington, (2) relieved of auditing responsibilities, (3) told that he was not to supervise staff because he thought too much of staff, (4) against his wishes, placed on a 14-month TDY assignment on PAQRS immediately prior to becoming eligible to retire - resulting in hardship to himself and his family, and (5) immediately upon completion of the 14-month TDY assignment, permanently reassigned to Washington on PCS; and that the Agency hired for the ARM positions two individuals who possessed the same or similar qualifications as those of the Petitioner - one was 37 years of age and the other was 47 years of age. Also, Mr. Myers, the Regional Manager, stated that sometimes between April and June, 1983 before PAQRS - he had decided that Mr. Carbone would not be an acceptable member of the BRO management team (Tr. Nov. 5, page 122, lines 2-15).

The courts have stated that once the Petitioner has satisfied the burden of presenting an acceptable prima-facie case, the burden shifts to the defendant (Agency) to "articulate some legitimate nondiscriminatory reason for the employee's rejection." The defendant bears only the burden of producing evidence rather than the burden of persuasion Krodel v. Young, 748 F.2d 701,705, 36 FEP Cases 468 (D.C. Cir. 1984). The Agency as discussed earlier, met this burden by presenting testimony to the effect that the reassignment action relative to the petitioner was for the legitimate management purpose of correcting a situation that had persisted in the Boston Regional Office during the regimes of four regional managers, that the Petitioner had failed to establish and to maintain positive work relationships with staff and management (unacceptable performance), and that there was a valid need for his "talents" in Washington. The Agency contended that if Mr. Carbone had been 30 years of age, he would not have been permitted to remain in Boston once Mr. Myers became the Regional Manager.

Once the defendant (Agency) satisfies its burden of articulating legitimate, non-discriminatory reasons for its actions, the Petitioner must then demonstrate that the defendant's articulated reasons were pretextual or not the only determining factor for the reassignment action, O'Connell V. Ford Motor Co., 11 FEP 1471 (E.D. Mich. 1975). In evaluating the pretextual arguments, "the court should look at the evidence as a whole to determine whether plaintiffs have met their burden of persuasion." Mistretta v. Sandia Corp., 639 F.2d 588, 597 24 FEP 316, 322-23 (10th Cir. 1980.) As indicated in the discussion section of this decision, the record, in summary, indicates the following:

a. Mr. Myers stated that after a meeting with Mr. Carbone and Mr. Lucas in April 1983, he made the decision that Mr. Carbone would not be an acceptable member of his management team (Tr. Nov. 5, page 119, lines 12-17). He testified that one of the factors which impacted his thinking as to whether Mr. Carbone would be offered a position on the management team (in the "BOX") was a conversation between himself, Mr. Carbone, and Mr. Lucas pertaining to new President Reagan initiatives concerning retirement age, reduction in employee benefits, and the "early out" of another employee. He stated that he asked Mr. Carbone if he had any interest in an "early out" and said that Mr. Carbone responded "no", he wanted "to work another year, needed some annuity growth or some such reason" (Tr. Nov. 5, pages 42-43).

b. On April 13, 1984, during a discussion between Mr. Schwandt, Mr. Myers, and Mr. Carbone concerning what Mr. Carbone would be doing when his 14-month TDY PAQRS assignment was ended and returned to the Boston Regional Office, Mr. Schwandt, as discussed earlier, testified that Mr. Carbone's retirement was discussed in terms of what Mr. Carbone would be doing next. Mr. Schwandt stated that there was an indication that Mr. Myers had some prior knowledge that Nick wanted to retire and that Mort (as he remembers) asked Mr. Carbone about it - in terms of if he were not going to retire, would that key other decisions Mr. Myers would have to make, and other opportunities within the Agency (Tr. Nov. 6, pages 31-32). He stated that it would not be accurate, however, to allege that Mr. Myers presented Mr. Carbone with an ultimatum to retire or be transferred.

c. Mr. Carbone stated that at that same meeting, the first thing Mr. Myers said to him was "I thought you were going to retire at the end - after working an additional year. You told me that at one point." Mr. Carbone said that he responded, "No, I never said that, Mort..." At that point, Mr. Myers is alleged to have said, "In that case, Frank Fee wants you in Washington to help institutionalize PAQRS...You're being transferred to Washington. Mr. Fee wants to talk to you about it." Mr. Carbone stated that, at that time, Mr. Myers gave him the time and the date of the meeting with Mr. Fee (Tr. Nov. 6, pages 283, 284). Mr. Carbone also stated that before the meeting, in a discussion with Mr. Schwandt, he told Mr. Schwandt that he had never told Mr. Myers that he was going to retire, and that the subject should not be discussed by

Mr. Myers because it "smacks of intimidation." Mr. Schwandt, Carbone said, stated that Mr. Myers was going to bring it up.

d. Mr. Myers stated that he never tied Mr. Carbone's transfer to his retirement. The record, however, indicates that Mr. Myers stated that on April 13, 1984 (same date expressed by Mr. Carbone) Mr. Schwandt advised him that Mr. Fee was interested in having Mr. Carbone assigned to his office in Washington to institutionalize PAQRS (Tr. Nov. 5, page 79). Mr. Schwandt, however, testified that in April 1984 he did not go to Boston with a message from Mr. Fee for Myers concerning Mr. Carbone's transfer to Washington, and that he had no idea on that date that Mr. Carbone was being transferred to Washington (Tr. Nov. 6, page 39). This statement by Mr. Schwandt is a direct contradiction to the testimony of Mr. Myers. Mr. Fee corroborated Mr. Schwandt's testimony by stating that on or about April 1984 he did not tell either Mr. Schwandt or Mr. Myers that Mr. Carbone was being transferred to Washington (Tr. Oct. 30, page 299, lines 6-9). But, then, Mr. Fee stated that he believed that around April 23, 1984 (same date expressed by Mr. Myers), he met with Mr. Carbone in Mr. Fee's office for the purpose of telling Mr. Carbone that he was being transferred to Washington. (Tr. Oct. 31, page 299, lines 10-20). Then Mr. Fee stated that he did not recall the April date (Tr. Oct. 31, page 300, lines 5-14); but Mr. Peterson, Mr. Fee's Assistant, stated that he believes that the initial meeting between Mr. Carbone and Mr. Fee regarding his transfer to Washington was April 1984.

e. The conflicting inconsistent testimonies of Mr. Myers, Mr. Schwandt, Mr. Fee, and Mr. Peterson concerning the same event creates serious credibility problems regarding (1) their stated reasons for and time of the transfer of Mr. Carbone, and (2) their statements that the issue of age and retirement was not a determining factor in their decision to transfer him. The credibility problem is compounded by the statements of Mr. Lucas who testified that on or about May 1984 Mr. Myers told him that Mr. Fee wanted to transfer Mr. Carbone "to Washington in a position - a valid GS-15 position, which had to do with continuation of the work Mr. Carbone had been working on in PAQRS - and that if Mr. Carbone did not choose to transfer, Mr. Carbone always had the option to retire" (Tr. Nov. 6, page 170, line 4-21). This statement is very similar to the one Mr. Carbone testified that Mr. Myers had said to him - that he could retire or be transferred (Tr. Nov. 6, page 284, lines 1-2). Mr. Myers denied giving Mr. Carbone this ultimatum, but the Agency did not deny the statement by Mr. Lucas. Also, the testimony of Mr. Schwandt - that Mr. Myers discussed Mr. Carbone's retirement in terms of expressions such as: if he were not going to retire what that would key - other decisions Mr. Myers would have to make, and other opportunities within the Agency - adds to the credibility of Mr. Carbone's testimony regarding the tie-in of age and retirement eligibility to the transfer action. There were other conflicting statements by Mr. Myers regarding the 1984 Needs Assessment (discussed earlier) and the 1985 Needs Assessment which included Mr. Myer's statement of Mr. Carbone's projected retirement or transfer - when the record does not indicate that Mr. Carbone had expressed an intention to retire. Also, there were the conflicting statements of Mr. Myers, Mr. Schwandt, and Mr. Fee regarding Mr. Carbone's reassignment as discussed earlier.

An overwhelming majority of the courts have held that the plaintiff must demonstrate that "but for" age the adverse action would not have happened, or that age was a "determining factor." To require the plaintiff to prove that age was the sole factor, the court stated, would impose an intolerable burden. Carter v. Maloney Trucking Co., 631 F.2d 40, 42, 24 FEP 492, 494 (4th Cir., 1980). The record indicates that the Petitioner met his burden to demonstrate that his age as it pertains to retirement eligibility was a determining factor in the Agency transfer action. Additional consideration is given to the fact that Mr. Carbone was given a 14-month TDY assignment immediately prior to his becoming eligible for retirement. He became eligible during the 14-month assignment, and less than a month after its

completion, he was notified that he was being transferred.

d. Legal Analysis - Constructive Discharge

The courts have stated that a constructive discharge occurs if working conditions are so difficult or unpleasant that a reasonable person would have felt compelled to resign, and that proof of employer intent to cause the termination is not necessary. Downey v. Southern Natural Gas Co., 649 F.2d 302, 26 FEP 550 (5th Cir., 1981). However, the courts have stated that a finding of constructive discharge must be justified by the existence of certain "aggravating factors." Pittman v. Hattiesburg Municipal Separate School District, 644 F.2d 1071, 1077, 25 FEP Cases 1349 (5th Cir., 1981).

(1) Agency Contentions. The Agency, as has already been discussed, contends that it is a known fact that management problems existed in the Boston Regional Office and that Mr. Carbone was a part of the problem. The Agency stated that in order to put a stop to these problems that had plagued the Boston Regional Office for years, Mr. Carbone had to be reassigned out of Boston. Additionally, the Agency contends, Mr. Carbone proved that he could be effective and successful doing the type of work that had been set aside for him in Washington; and even if he had been 30 years old and not eligible to retire, he would not have been permitted to remain in Boston once Mr. Myers became Regional Manager of the Boston Regional Office (Tr. Nov. 13, page 26).

(2) Petitioner Contentions. The Petitioner contends that the Agency allegation of his inability to establish and to maintain positive work relationships with staff and management is pretext and was the means by which the Agency constructively discharged and discriminated against him because of his age (Tr. Nov. 13, page 10, lines 14-20). The Petitioner stated that at the time of his reassignment he was 56 years of age, eligible to retire, and had received at least "fully satisfactory" performance ratings by the Regional Manager (Mr. Sorando and Mr. Lucas) before Mr. Myers and his family had roots in Boston. He stated that his wife refused to move at that stage in life and that relocating to Washington to a position with no promotion potential would cause an extreme financial hardship, and the heavy financial burden of maintaining two homes on him and his family. Mr. Carbone stated that there was no performance-based reason for his reassignment to Washington, and that working conditions were such that a reasonable person in his position would have felt compelled to retire (Tr. Nov. 13, page 15).

3. Aggravating Factors The evidence in this case relative to the allegations made and proof offered by both parties has been thoroughly reviewed and analyzed in the preceding discussions, so will not be reiterated in depth here. There is a determination yet to be made, however, and that is whether there were "aggravating factors" present in the actions taken by management and, if so, were they such as to make working conditions so difficult that a reasonable person in Mr. Carbone's position would have felt compelled to retire. The actions taken by management are examined in this context and are as follows:

a. Removal from Management Structure of the BRO Mr. Carbone retired from the Federal Government, GAO, on March 28, 1985 after 33-1/2 years of service. At the time Mr. Myers officially assumed the duties of Regional Manager of the Boston Regional Office on July 24, 1983, Mr. Carbone had been an Assistant Regional Manager since 1970, approximately 13 years. Mr. Myers stated that after reading documents and discussing the conditions in the BRO prior to his officially assuming the position of Regional Manager, he made the decision in April 1983 that Mr. Carbone would not be an acceptable member of his management team (Tr. Nov. 5, page 119, lines 12-17). Mr. Carbone stated that he was never given an opportunity to respond to the management prerogatives or initiatives of Mr. Myers - that he had never really worked with Mr. Myers. These statements were not disputed by the Agency. The record

indicates that under cross-examination, Mr. Myers stated that in his capacity as Regional Manager, and prior to Mr. Carbone's assignment to PAQRS in July 1983, Mr. Myers had been exposed to Mr. Carbone's performance a total time of approximately two weeks only (Tr. Nov. 5, pages 117-122). Additionally, Mr. Myers stated that Mr. Myers had no problems with Mr. Carbone's performance (Tr. Nov. 5, page 123, lines 16-24); page 124, lines 1-3). The aggravating factor in this action is the decision by the Regional Manager that an ARM with 13 years service in the position, but who had never worked for the Regional Manager, would not be an acceptable member of the management team.

b. Charge of Insubordination by Mr. Myers; Exclusion of Mr. Carbone from Management Duties and Staff Supervision Mr. Myers stated that prior to the assignment of Mr. Carbone to PAQRS, he offered Mr. Carbone several duties which Mr. Carbone did not accept. Mr. Myers considered the alleged refusal as an act of insubordination and stated that it created "in my mind an untenable condition for me to operate (in)" (Tr. Nov. 5, pages 52-55). Mr. Carbone stated that the duties were offered, not assigned as was the case in PAQRS, as, for example, "would you like to take over the Executive Secretariat of the New England Intergovernmental Audit Forum?" Mr. Carbone stated that he responded that he was not interested in the duties as full-time assignments because he did not believe they were grade-sustaining - that in the past, GS-13s had been performing the tasks while performing full-time Evaluator functions. Mr. Carbone stated that not at any time did he refuse to do the work. The tasks, he said, were offered during the discussion and he responded that he was not interested.

The record indicates that an offer, not a directed assignment, was made by Mr. Myers (Tr. Nov. 5, pages 52, lines 11-24; pages 53-55; page 56, lines 6-16). The record also reflects that Mr. Myers stated that Mr. Carbone may, indeed, have expressed objection on the grounds that he did not think the duties were grade-sustaining (Tr. Nov. 5, page 56, lines 11-16). Additionally, Mr. Myers acknowledged that at the meeting, he told Mr. Carbone that he did not want him working with staff - "or something similar to that" (Tr. Nov. 5, page 58, lines 3-24). The record also indicates that Mr. Myers nominated Mr. Carbone to the PAQRS assignment and directed him to accept the appointment even though Mr. Carbone had stated that he would not like the assignment (Tr. Nov. 5, pages 278 and 279); and that Mr. Myers stated that while Mr. Carbone "wasn't leaping or jumping at it (the PAQRS assignment...he never told Mr. Myers that he would not accept the assignment - he never turned it down" (Tr. Nov. 5, page 71).

The credibility of the testimony of Mr. Carbone on this issue is enhanced by the testimony of Mr. Lucas who stated that Mr. Myers had told Mr. Lucas that he did not want Mr. Lucas as an ARM, that he would not be the Regional Manager for Audits because that was too big a chunk of the Region, and that he wanted to give him assignments with no staff (Tr. Nov. 5, pages 175-176). Mr. Lucas, like Mr. Carbone, was an ARM in the BRO at that time, and the record (uncontested) indicates that Mr. Myers made virtually the same statements to each. The record does not indicate, however, that Mr. Lucas was charged with insubordination. The consideration of this action as an aggravating factor becomes more pertinent in the light of Mr. Fee's testimony that ARMs not selected for the "BOX" would be doing audit work as an Audit ARM - managing jobs. (Mr. Lucas is now an audit ARM). He stated specifically, that that would be Mr. Carbone's assignment (Tr. Oct. 30, page 243 and 244).

An Agency must prove intent if an appellant presents a credible explanation for alleged insubordination. **Gatling v. National Transportation Board**, NY07528110203 (1983). The evidence presented in regard to the issue of insubordination does not indicate that the Petitioner failed to accomplish, refused to perform, or intentionally disregarded a direct order. Rather, it indicates that no direct order was given, and that more probable than not the proposals were stated in such a manner as to give the Petitioner a choice of

accepting or rejecting. Additionally, the record does indicate that under Mr. Myers the Petitioner, contrary to the statement of Mr. Fee that his assignments would be (auditing) was no longer allowed to perform audit functions or to supervise staff - a situation which does reflect an involuntary or de-facto demotion as alleged by the Petitioner. Cohn v. Department of Transportation, 5 MSPB 385 (1981); See Morrow v. Dept. of Army, 4 MSPB 494 (1980). The aggravating factor here is the charge of insubordination without credible proof of intent reflected in the record and using this charge as the basis of a TDY personnel action; and (2) removing management and staff supervisory functions from the responsibilities of Mr. Carbone after 13 years as an ARM, and without a stated logical reason.

c. Promotion of Younger Employees to "BOX" ARM Positions. On July 10, 1983, Mr. Jan Goldstein, a 37-year-old, was promoted to the position of ARM for Operations in the Boston Regional Office. He had worked for Mr. Myers in Washington, D.C. The request for promotion was initiated by Mr. Myers on May 5, 1983, approximately one month after Mr. Myers became the Regional Manager of the BRO (Agency Exh. 3, part 2, Exh. 23; Tr. Oct. 29, pages 306-308). In October 1983 Mr. Ken Croke became the ARM for Planning and Reporting in the BRO. Mr. Carbone was on TDY in Washington on the PAQRS project at that time. Mr. Croke was approximately 49 years of age. At the time of his TDY assignment, Mr. Carbone was still carried as an ARM in the BRO, reporting directly to the Regional Manager. On April 13, 1984, during the period of his TDY and in a discussion with Mr. Myers and Mr. Schwandt, Mr. Carbone stated that he had objected to Mr. Schwandt and Mr. Myers discussing his status with his peers, Mr. Goldstein and Mr. Croke. He stated that Mr. Myers responded that they were not his peers and that he worked for them (Tr. Nov. 6, page 285). The Agency did not deny this testimony. The aggravating factor here, as reflected in the record, is Mr. Carbone's change in status within his peer group without his having been informed that the change had taken place.

d. PAQRS Assignment and Conflicting Statements of Mr. Myers and Mr. Fee. The record indicates that in July 1983, about a week following the discussion between Mr. Carbone and Mr. Myers concerning the projects he might do, Mr. Carbone was assigned to the PAQRS project by Mr. Myers. At that time, Mr. Carbone, the record indicates, was several months away from becoming eligible to retire and stated that he had no desire to be assigned to this 14-month TDY assignment at this stage of his career. Mr. Myers stated that he was very fortunate or lucky that this PAQRS initiative was being staffed for the Comptroller General at this time. He stated that his nomination of Mr. Carbone to this bonafide, high level prevented his having to take action against a senior ARM for insubordination (Tr. Nov. 5, pages 63-66; page 70). Mr. Carbone stated that Mr. Myers directed him to take the PAQRS assignment (Tr. Nov. 6, pages 278-280) and he responded "fine; what can I say." As discussed earlier, the record does not indicate that Mr. Carbone was officially assigned the duties upon which Mr. Myers based the allegation of insubordination, nor directed to perform them, and refused to do so - thus enhancing the credibility of Mr. Carbone's testimony and reducing the credibility of the reason given by Mr. Myers as to why Mr. Carbone was assigned to PAQRS. Additionally, Mr. Fee gives a somewhat different reason as to why Mr. Carbone was selected for the PAQRS project. He stated that Mr. Carbone did not assume the duties of an ARM outside the "BOX" in the BRO after Mr. Myers became Regional Manager because Mr. Carbone was assigned to PAQRS due to his experience in auditing - extensive experience in auditing - and was somewhat of a stickler for detail (Tr. Oct. 30, page 253, lines 11-24; page 254; page 255; page 256). The aggravating factor here, as reflected in the record is that Mr. Carbone was appointed to a 14-month TDY assignment in Washington, D.C. by Mr. Myers to keep Mr. Myers from taking action against a senior ARM for alleged insubordination - a charge not supported by the record. Additionally, Mr. Carbone was refused auditing responsibilities in BRO, but was placed on TDY because of his skills as an auditor.

e. Reassignment to Washington Resulting in Permanent Change of Station Mr. Carbone completed his 14-month TDY assignment on PAQRS in December 1984, and in January 1985, he was ordered to report to Washington, D.C. on a permanent change of station (PCS), effective March 18, 1985 (Agency Exh. 3, part 2, Exh. 21-A). The reasons given for the reassignment, as shown in the record, were Mr. Carbone's inability to establish and to maintain positive work relationships with staff and management in the Boston Regional Office, and for the efficiency of the service. These allegations imply poor or unacceptable performance by the Petitioner in establishing positive work relationships. Mr. Fee and Mr. Myers, as discussed earlier, cited the performance appraisals of Mr. Lucas and Mr. Sorando as the evidence of Mr. Carbone's inability to get along with the staff (Tr. Nov. 6, page 293; Agency Exh. 3G, Mr. Carbone's Affidavit; Tr. Oct. 31, page 27). Mr. Sorando, however, stated that, overall, Mr. Carbone's performance as an ARM was "above average" and was as good as that of any of the other ARMs (Tr. Oct. 29, page 244, lines 3-22). Mr. Lucas stated that he gave Mr. Carbone a fully successful rating (Tr. Nov. 6, page 213, lines 11-24). Again, the aggravating factor in regard to this allegation is the charge of poor performance by the Agency, based upon the performance appraisals of two former Regional Managers (who categorically disagreed with the Agency's assessment of their appraisals) then reassigning the Petitioner to a PCS based upon the Agency's assessment of the performance ratings. Additionally, the position to which the Petitioner was reassigned was a demotion from a Supervisory Evaluator GS-15 Assistant Regional Manager position to a position of Management Analyst, GS-15, non-supervisory. The Petitioner, as reflected in the record, was offered no alternative to the reassignment. He accepted the reassignment, then retired.

The evidentiary record as a whole indicates that for each of the Agency's articulated non-discriminatory reasons offered in support of its contention that the Petitioner was reassigned because of his inability to maintain positive work relationships with subordinate and management staffs at the Boston Regional Office, the Petitioner met his burden of persuasion with regard to his claims that there was no performance-based reason for his reassignment, and that age was a determining factor in the reassignment action, which resulted in his constructive discharge. The "aggravating factors" presented by the Petitioner are compelling and persuasive, and they justify his contention that because of them and the on-going pressure under which the Agency forced him to work, working conditions became so difficult and unpleasant that a reasonable person would have felt compelled to resign.

The record shows that the reassignment of the Petitioner resulted at least in part from the reorganization of the BRO, the Petitioner was demoted from a Supervisory Evaluator Assistant Regional Manager, GS-15 position in the Boston Regional Office to a Management Analyst GS-15, non-supervisory position in Washington, D.C. In a similar case, Endres v. Helms, Administrator, Federal Aviation Administration, No. 83-2573, August 22, 1985 (U.S. District Court, District of Columbia) the court stated that the transfer of a 58-year old GS-15 FAA Chief, of Operations in Washington, D.C. to a GS-15 position as branch chief in Chicago was a demotion, qualified as a personnel action, and was thus within the Scope of ADEA, regardless of whether such transfer qualified as adverse action for purpose of the Civil Service Reform Act. Additionally, the Court stated that the 58-year old made out his prima-facia case in that he was qualified to serve as the Chief of Safety and Compliance Division, was not selected for that position or for any comparable position, and the position was given to younger employees. The situation is analogous in the instant case, Carbone v. GAO. Mr. Carbone had received performance appraisal ratings of "above average" and "fully successful" by the two Regional Managers (Mr. Sorando and Mr. Lucas) who preceded Mr. Myers, the Regional Manager under whose tenure the reassignment of Mr. Carbone was effected. The record indicates that Mr. Carbone worked under Mr. Myers' supervision for a period of approximately two weeks only. Mr. Carbone was qualified for the ARM positions in the "BOX" or the

ARM for Audit positions. He was not selected for any of the Positions. Two younger employees were selected for the positions in the "BOX"; other ARM type functions at the GS-15 level are being accomplished by two GS-15s who, the Regional Manager states are on temporary assignment in the BRO, and Mr. Lucas, who states that he has the title of ARM, but has no managerial duties.

Though it was a demotion, the Petitioner did not refuse the assignment position but, as the record indicates, because he was not given a choice, he accepted the position and the demotion, then retired - citing age, constructive discharge, and hardship as reasons for his resignation. The case Else v. Department of Justice, 3 MSPB 475 (1980), states that hardship, inconvenience, and subjective satisfaction are not sufficient reasons for refusing reassignments (which the Petitioner did not do). The Agency must, however, (the Board continued), demonstrate that the reassignment promotes the efficiency of the service. It is not enough for the Agency to show a rational basis for the reassignment, such as "job requirement." There must be a demonstration by a preponderance of the evidence that the reassignment was based upon a legitimate management reason. (Underlining for emphasis). Army v. Veterans Administration, 7 MSPB 624 (1981) states that to reach the ultimate conclusion of whether service efficiency is enhanced through an adverse action, the Agency must satisfy its burden of proof that the appellant is at fault for the conduct charged, that the conduct for which the appellant is faulted impairs service efficiency, and that the penalty is appropriate.

The Agency testified that the reassignment was not a punitive action, then stated that the Petitioner was at fault for the reassignment in that he failed to establish and to maintain positive work relationships with staff and management, that this failure impaired service efficiency, and that the reassignment action taken by the Agency was appropriate. The record, however, when viewed as a whole, does not support the contentions of the Agency by a preponderance of the evidence. Conversely, it refutes the unacceptable performance allegation - using the references which the Agency cites in support of its actions - the Performance Appraisals of Mr. Sorando and Mr. Lucas. Both of these appraisals rated Mr. Carbone as being "fully successful" and "above average." Additionally, both Mr. Sorando and Mr. Lucas disagreed totally with the Agency's interpretation of the comments made by the raters on the appraisals. The arguments of Mr. Lucas and Mr. Sorando were credible and persuasive. The Agency's rational basis for the reassignment-Mr. Carbone's outstanding work on the PAQRS and the need for his assistance in "institutionalizing" the concept of PAQRS is offset by the evidence in the record as a whole, which includes a showing that some of the duties that were to have been assigned to him were assigned to other staff members and some were never done. The Agency's rational basis is not a sufficient reason within itself for the actions taken. Else v. Department of Justice, cited earlier.

The record does not support the Agency's contention of unacceptable performance and compelling job requirements as legitimate management reasons for the reassignment. In this regard, the Agency did not meet its burden of persuasion by a preponderance of the evidence as required. Additionally, the record, some of which is discussed in this decision (other testimony is available) supports a finding that "aggravating factors" in support of the petitioner's constructive discharge claims did exist and were of such nature as to make working conditions so difficult or unpleasant that a reasonable person would have felt compelled to resign. The Petitioner, a long time Federal employee, was denied a management position in the reorganization of the BRO; was stripped of his office and staff managerial and supervisory responsibilities; managerial positions for which he was qualified were given to younger employees; he was placed on a 14-month TDY assignment to Washington just prior to becoming eligible to retire; after becoming eligible to retire and having completed his 14-month TDY assignment, he was immediately given notice of his reassignment to Washington; he was told that his performance was unacceptable but

had received "fully acceptable" and "above average" performance ratings; and was humiliated and suffered loss of prestige by the Agency's actions. The charge of constructive discharge with age as a determining factor is upheld.

The Courts have stated that if the plaintiff succeeds in demonstrating pretext, the employer's articulated reason will not stand. Such was the case in this complaint. The decision is for the Petitioner.

The Petitioner requests the following relief:

1. Reinstatement in the Boston Regional Office as a GS-15,
2. Restoration of all lost benefits,
3. Reimbursement of costs incurred in pursuing this case, and legal fees.

The relief requested by the Petitioner is granted.